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In the Supreme Court of the United States

OCTOBER TERM, 1995

APACHE CORPORATION, *Petitioner*

v.

LEO MOORE, DAISY MOORE, AND BESS COLE,
Respondents

On Petition for a Writ of Certiorari to the Court of Appeals of Texas

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PETITION FOR A WRIT OF CERTIORARI

JESS H. HALL, JR.
JAMES E. ESSIG
JEFF WEEMS
Liddell, Sapp, Zivley, Hill & LaBoon, L.L.P.
3300 Texas Commerce Tower
Houston, TX 77002
(713) 226-1200

ANDREW L. FREY*
EVAN M. TAGER
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0602

Counsel for Petitioner
** Counsel of Record*

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12 pp

QUESTION PRESENTED

Whether the $1.5 million punitive exaction in this case, which is 138 times the harm suffered by respondents, is so grossly excessive as to violate the Due Process Clause of the Fourteenth Amendment.

RULE 29.6 STATEMENT

Petitioner Apache Corporation has no parent corporation and no subsidiaries that are not wholly owned.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Apache Corporation (hereinafter "Apache") respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of Texas in this case.

OPINIONS BELOW

The judgment of the district court of Randall County (App., *infra*, 37a-44a) is unreported. The opinion of the Court of Appeals of Texas affirming in relevant part the judgment against Apache and denying Apache's motion for rehearing (App., *infra*, 1a-36a) is reported at 891 S.W.2d 671. The orders of the Texas Supreme Court denying Apache's application for a writ of error (App., *infra*, 45a-46a) and overruling Apache's motion for rehearing (App., *infra*, 47a-48a) are unreported.

JURISDICTION

The Court of Appeals of Texas issued an opinion in this case on July 29, 1994 and denied Apache's timely filed motion for rehearing on October 20, 1994. App., *infra*, 1a. The Texas Supreme Court denied Apache's timely filed motion for a writ of error on October 27, 1995, and overruled Apache's timely filed motion for rehearing on December 7, 1995. App., *infra*, 45a-48a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT

This is a classic case of punishing the victim. Apache — whose business it is to explore for and produce natural gas for the benefit of itself as well as royalty holders — suffered a blowout at one of its most promising wells, losing approximately $70 million worth of gas and incurring an expense of roughly $45 million to kill the blowout. The *only*

harm suffered by anyone as a result of the blowout involved the loss of revenues attributable to gas that was vented to the atmosphere before the blowout was killed. No one was killed or injured, no structures (other than the well itself) were damaged, no livestock was harmed, and no crops were damaged. Yet because of this blowout, for which the biggest loser by far was Apache itself, the jury punished Apache $4.5 million, $1.5 million of which remains at issue after settlement with some of the plaintiffs. Because it is wholly unreasonable to conclude that any significant amount of punitive damages (and certainly nothing close to $4.5 million) is necessary to deter a company from being victimized by the negligence or malfeasance of its employees, this case supplies still another example of the need for this Court to continue the process of staking out the constitutional limits on the amount of punitive damages that may be imposed in various generally recurring circumstances.

1. Apache is an oil and gas exploration and production company. In 1981, it had drilled a 16,288-foot natural gas well, known as the Key 1-11 well. The well was located just outside of Allison, Texas, in Wheeler County, an extremely sparsely populated county in the Texas panhandle. App., *infra,* 2a; Tr. 1345, 1398, 2587.[1] Apache owned a 50% working interest in the well; the other 50% working interest was owned by El Paso Production Company, now known as Meridian Oil Production, Inc. (hereinafter "Meridian"). App., *infra,* at 2a.

Apache hired Ratliff Drilling Company to drill the well. App., *infra,* 2a; Tr. 1365, 1449-1450. Consistent with the method of drilling other deep gas wells of this sort, the Key 1-11 well was constructed in the following manner. First, 20-inch diameter conductor pipe was inserted into the ground from the surface to a depth of approximately 100 feet and

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[1] The designation "Tr. __" refers to the transcript of the trial below.

cemented in place. Tr. 1347-1348, 1350-1351, 1354, 1367, 1417, 2717-2718. Next, 10¾-inch surface casing was run inside the conductor pipe to a depth of approximately 5,200 feet and cemented in place. Tr. 1351-1352, 1354, 1368, 2719-2720. Then a string of 7⅝-inch "intermediate" casing was run inside the conductor pipe and surface casing from the surface to a depth of 15,850 feet and cemented in place. Tr. 1356-1357, 1367, 1368-1370, 1373-1375, 1383-1384, 1404, 2721. A string of five-inch pipe, called a "liner," was then attached to the intermediate casing at a depth of 15,514 feet, run to a depth of 16,285 feet (three feet from the bottom), and cemented in place. Tr. 1384, 1385, 1402-1404, 2722-2723. Next, the well was perforated by an independent contractor selected specifically for its expertise in this area. Tr. 1402, 1407, 1711-1712. The perforation process involved running a "perforator" to depths of from 16,008 feet to 16,082 feet, and sending impulses to the perforator, which then fired charges through the liner and on into the formation. This enabled the gas to flow from the formation into the well. Tr. 1409-1412, 1418-1419, 1521, 1532, 1711-1712, 2632, 2648, 2723. Finally, to bring the gas to the surface, a string of 2⅞-inch production tubing was run from the surface to within a few feet of the bottom of the well. Tr. 1405-1406, 1418, 1420.[2]

In May 1981, while Ratliff was drilling the well, the well experienced a "kick" — that is, fluids and gas began to flow into the well bore, causing newly poured cement from the bottom of the hole to back up into the casing, where it hardened. App., *infra*, 2a; Tr. 1485-1489, 1492, 1494-1495,

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[2] All of the different kinds of pipe came in segments that had to be joined together. Apache retained independent contractors to screw the pipe together using a specialized "cutting-edge" technology that exceeded industry standards. Tr. 2682-2687.

2667-2668, 2724.[3] Apache responded to this problem by retaining a specialist to drill the cement out of the casing. App., *infra,* 2a; Tr. 1495, 2728. Ratliff then continued its work on the well. Tr. 1498-1499.

Upon completion of the well, the well was shut in — *i.e.*, all valves on the wellhead assembly were closed — to await completion of a connecting pipeline. App., *infra,* 3a. After the well was shut in, Apache noticed some pressure on the backside of the well — *i.e.*, between the production tubing and the casing. *Ibid.*; Tr. 1522-1525, 2548. In an effort to determine the source of the pressure, Apache conducted a test, the results of which were inconclusive. App., *infra,* 3a; Tr. 1532-1533. Having been unsuccessful in determining the source of the pressure, Apache had two options for addressing the situation: it could move in a workover rig and pull the more than three miles of tubing out of the well bore, an approach that is extremely risky and is not recommended within the industry, or it could follow the prevailing prudent industry custom at the time, which was to have a casing relief valve installed on the well. Tr. 2731-2736. A relief valve is designed to prevent excessive pressure in the well by opening and letting gas escape whenever the pressure exceeds a specified level and then closing when the pressure subsides to another, lower level. Tr. 1533-1534, 1539-1541, 2623-2624, 2656, 2715, 2852-2853, 3319-3320. Apache opted to follow industry custom and contracted with a valve specialist to install a relief valve. App, *infra,* 3a.

The well, which was located far from any residences or other inhabited area, remained shut in throughout the summer of 1981, during which time it was fenced off from the surrounding fields. See P. Exhs. 17, 28; Tr. 1567, 1704, 1783, 1787. Because the well was shut in with the relief valve in place, there was little activity at the well site: the

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[3] It is undisputed that the kick was the result of negligence on the part of Ratliff's drilling crew. Tr. 2725-2728.

only individuals who came on the well site were the contractors who installed the fence and gravel around the well, and an Apache "pumper" whose responsibility it was to check the pressure on the well and monitor the relief valve and who, in performing those functions, had no need to spend any more than a few minutes per day at the well site. Tr. 1564, 1567, 1707, 1782, 1783, 3237, 3245.

Unbeknownst to Apache, by late September or early October, the relief valve was not functioning properly.[4] As a consequence, the pressure on the backside increased beyond the point at which the valve was supposed to open. Tr. 2623-2624. As a result of the increased pressure, the well blew out without warning on October 4, 1981. Tr. 2561, 2621-2624, 2882. Unsurprisingly, no one was present at the time of the blowout, which was detected by a derrick hand who was working on a drilling rig a few hundred yards away. Tr. 2373. The blowout vented gas at a substantial rate until Apache, after extremely costly and continuous efforts, succeeded in diverting the gas into a pipeline nine months later, in June 1982. The lost gas had a market value of close to $70 million. The blowout ultimately was killed on February 9, 1983. App., *infra,* 4a, 35a. The total expense to Apache of diverting the gas into a pipeline and ultimately killing the blowout came to approximately $45 million. Tr. 2612.

2. Meanwhile, in January 1982, Arkla Exploration Company and Stevens Production Company filed suit against Apache and Meridian, alleging that the blowout had resulted

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[4] The parties disputed the reason for the valve's failure to function. Respondents' expert speculated that the valve was not connected to the nitrogen bottles that were its power source. Tr. 1569-1570. Apache's expert testified that the tubing that carried the nitrogen to the relief mechanism had become corroded as a result of being exposed to brine and that the corrosion caused holes through which the nitrogen escaped, leaving the relief mechanism without power. Tr. 2956-2976.

in an improper diversion of gas from a neighboring well. Apache and Meridian then brought third-party actions against the manufacturer/installer of the relief valve, the tubing company, the drilling company, and various other entities, alleging that products manufactured by them and/or services performed by them were responsible for the blowout. Various adjacent royalty holders (including the three respondents) and other working interest owners then intervened as plaintiffs, seeking to recover from Apache for the value of gas attributable to them that was lost as a result of the blowout. They also sought punitive damages, alleging that Apache was grossly negligent and had committed an intentional conversion. App., *infra,* 4a, 11a.[5]

Prior to trial, Apache and Meridian settled with the original plaintiffs, all but one of the third-party defendants, and all but eight intervenor-plaintiffs. After the jury was seated and before testimony began, Apache and Meridian settled with the final third-party defendant. App., *infra,* 5a. The trial thus proceeded solely with the eight remaining intervenor-plaintiffs.

The intervenor-plaintiffs' theory of the case was that Apache's employees should have ordered tests to determine whether the casing had been damaged when the cement was drilled out after the "kick," should have removed all 16,000 feet of the tubing and reworked the well after discovering the pressure on the backside, should have set the pressure relief valve at a lower setting, and should have monitored that valve more closely. In addition, over Apache's strenuous objection, they adduced days and days of highly inflammatory testimony about Apache employees accepting kickbacks from contractors in the form of money, cars, alcohol, and, on a

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[5] The jury did not find intentional conversion, and that claim is not part of the case as it comes to this Court.

few occasions, drugs and prostitutes.[6] Although this evidence had only the most attenuated and speculative connection to the blowout,[7] the intervenor-plaintiffs encouraged the jury to punish Apache because of that scandal. Tr. 4314-4323. One of the intervenor-plaintiffs, who appeared pro se, even went so far as to argue that God required the jury to punish Apache for the sins its employees had committed. Tr. 4368-4369, 4370-4373.

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[6] It was undisputed that Apache itself ferreted out the kickback scandal (which was endemic in the oil patch (see App., *infra*, 10a)), fired the involved employees, and cooperated fully with law enforcement authorities. Tr. 1193-1194, 1204-1206, 1225-1226, 1245-1252, 1258-1293, 1303; P. Exhs. 52, 54, 56-60.

[7] Of the various Apache employees involved in the scandal, only a few had anything to do with the Key 1-11 well. Pl. Exhs. 60, 62. There was no evidence whatever that the conduct of any of these men in connection with the drilling of the well was impacted by his having accepted kickbacks. The employee whose conduct bore the strongest relationship to the blowout was Tom Reames, the pumper who allegedly failed to check the relief valve to ensure that it was working properly. See App., *infra*, 9a; Tr. 1531-1532, 1584, 2792, 2883; 3241. There was neither evidence nor suggestion at trial that Reames was a recipient of kickbacks.

In support of its conclusion that there was sufficient evidence that the blowout was causally related to the kickbacks, the court of appeals adverted to testimony of Apache's in-house counsel that the law presumes that kickbacks affect the way people perform their jobs. App., *infra*, 8a. The attorney made that statement in explaining Apache's legal position in its lawsuit against the company that had given kickbacks to Apache employees, White Stripe Inspection Company. Apache had used White Stripe to inspect pipe for numerous wells, including the Key 1-11 well. The point of the Apache attorney's testimony was simply that Apache was not required to point to any specific injury in order to recover the value of kickbacks from White Stripe because the law presumes injury. Tr. 1217. That statement is light years away, however, from supplying support for the proposition that the *blowout* itself was in any way actually caused by employee receipt of kickbacks. Indeed, the attorney repeatedly stated that kickbacks do not in fact necessarily affect performance. Tr. 1210, 1213, 1218-1219, 1221, 1222.

The case was submitted only against Apache. The jury found that Apache was grossly negligent and awarded the eight intervenor-plaintiffs a total of $81,282 in compensatory damages, $10,835 of which was allocated to the three respondents. In addition, the jury imposed punitive damages of $4 million plus $500,000 in attorneys' fees, the sums to be allocated equally among the eight intervenor-plaintiffs. App., *infra,* 11a.

After the verdict, Apache settled with five of the intervenor-plaintiffs (App., *infra,* 12a) and appealed the judgment in favor of the remaining three, who are respondents herein. The court of appeals held that respondents had adduced sufficient evidence to support the imposition of punitive damages. *Id.* at 16a-23a. In so holding, the court relied principally upon its conclusion that the evidence would support a finding that "Apache had actual knowledge that acts and omissions (in the form of kickbacks) attributable to it created an extreme degree of risk" and that "Apache consciously disregarded those risks." *Id.* at 19a.[8] The court

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[8] The record in fact provides no support for the proposition that, prior to the blowout, Apache management had "actual knowledge" of the existence of the kickback practices, let alone that the kickbacks created "an extreme degree of risk." The most that the record shows is that in 1980 an employee in the Tulsa office received a private investigator's report stating that an Apache employee, Ralph Walker, "possibly uses" White Stripe Inspection Company, which "will normally give a ten percent kickback" if necessary to get a contract. P. Exh. 65, at 2077. Although one of Apache's in-house lawyers stated in an internal memorandum that the 1980 report "was apparently sent" to Apache's president (*id.* at 2073), Apache's subsequent investigation yielded no evidence that the report indeed had been given to the president or anyone else in the corporate hierarchy (Tr. 1314, 1319-1320). More significantly, nothing in the 1980 report gave any reason to believe that White Stripe was not performing its functions adequately or that using White Stripe created "an extreme degree of risk." Rather, the report indicates simply that the kickbacks were objectionable because they resulted in higher costs to Apache. P. Exh. 65, at 2077.

also concluded that the evidence would support a finding that "Apache consciously disregarded the risks associated with the kick and the ensuing leak, circumstances which it knew were capable of causing a blowout." *Id.* at 21a.[9] The court of appeals also held that the $4 million exaction against Apache was not excessive. *Id.* at 27a-31a.[10] It did, however, find that the award of attorneys' fees was unsupported by adequate evidence; it accordingly vacated that award. *Id.* at 33a-34a.

Apache was unsuccessful in securing review from the Texas Supreme Court. App., *infra,* 45a-48a. On February 20, 1996, this Court stayed execution of the judgment pending the timely filing and disposition of a petition for certiorari. 64 U.S.L.W. 3556.

REASONS FOR GRANTING THE PETITION

The Court has granted certiorari in *BMW of North America, Inc.* v. *Gore,* No. 94-896, to consider, among other things, whether the $2 million remitted award in that case is

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[9] In particular, the court identified (1) the decision not to run tests to determine whether the casings had been damaged by the "kick"; (2) the decision to shut in the well without pulling the pipe and reworking the well; (3) the failure to monitor the relief valve adequately; and (4) the decision to put Gordon Clower in charge of the well despite the knowledge of some low-level employees in the Elk City field office that Clower was an alcoholic. App., *infra,* 20a.

[10] Although the court rejected Apache's excessiveness claim, it did so under a highly constricted standard of review. The court prefaced its analysis by stating that "[t]he amount of exemplary damages to be awarded is uniquely within the jury's discretion" and that "[u]nless the size of the award and the circumstances of the case indicate the award was the result of passion or prejudice, or that the evidence has been disregarded by the jury, the verdict is conclusive and should not be set aside either by the trial or appellate court." App., *infra,* 27a. Later it went even further, stating that "[i]f the evidence is factually sufficient to support a jury award of any amount, the court has no authority to suggest a remittitur, no matter how manifestly unjust or shocking to the conscience of the court the amount of the award may be." *Id.* at 32a.

so excessive as to violate due process. Apache intends to raise a substantially similar issue in its petition for certiorari. While the particulars of the cases are of course different, the parallels are more than sufficient to establish the likelihood that this Court will hold the case for disposition in light of its decision in *BMW*. See R. STERN, E. GRESSMAN, S. SHAPIRO & K. GELLER, SUPREME COURT PRACTICE § 4.16, at 192-193 (7th ed. 1993).

1. The punitive damages are disproportionate to the actual and potential harm to the respondents.

As in *BMW*, the punitive damages here are strikingly disproportionate to the harm suffered by or threatened to the respondents. The ratio of punitive to compensatory damages in *BMW* is 500:1, while here the ratio of the aggregate punitive damages judgment in favor of the three respondents ($1.5 million) to the aggregate compensatory damages ($10,835) is an only moderately less enormous 138:1. The respondents suffered only a minor injury to their royalty interest in the gas beneath their land. App., *infra*, 15a-16a. In such circumstances, a $1.5 million exaction is grossly disproportionate.

The Court of Appeals did not suggest that a ratio this large is defensible in the ordinary case. Rather, it concluded that the reasonableness of the punitive exaction should be measured not only by the harm suffered by respondents, but also by the harm that might conceivably have occurred. In particular, the court indicated that, although no one was in fact injured by the blowout, it was possible that someone could have been. App., *infra*, 28a. This reasoning is unsustainable for several reasons.

To begin with, unlike in *TXO Prod. Corp.* v. *Alliance Resources Corp.*, 113 S. Ct. 2711 (1993), there is no suggestion — let alone evidence — here that *respondents*, who lived nowhere near the well, had any conceivable risk of

physical injury.[11] Nor is it justifiable to consider potential physical harm to anyone else. As Justice White recently explained for a unanimous panel of the Eighth Circuit, the potential harm inquiry is not an open invitation to consider remote and speculative injury. Rather, to be considered in the analysis, the potential harm must be *likely*. *Pulla* v. *Amoco Oil Co.*, 72 F.3d 648, 659-660 (8th Cir. 1995). Here, there was no evidence whatever (nor even an oblique suggestion) that a blowout of a shut-in well, as to which no one other than trained personnel had access, was likely to cause injury. Accordingly, there is no basis in this record for justifying the disproportionate punitive exaction by reference to the concept of "potential" harm to third parties.

Finally, there is a serious doctrinal question about whether potential harm (whether or not it is speculative) should have any role in cases like this one. The concept of "potential harm" has been invoked principally, if not exclusively, in cases of failed attempts — *i.e.*, cases involving *deliberate* misconduct that fell short of its *intended* consequences. *TXO*, for example, involved an unsuccessful effort to bully a small property owner into giving up potentially valuable mineral rights. In that case, it made good sense for the Court to take into account the losses that the respondent might have sustained had the petitioner's oppressive scheme succeeded. See also *Livesy* v. *Stock*, 281 P. 70 (Cal. 1929); *Gilreath* v. *Allen*, 32 N.C. 67, 70 (1849); *Benson* v. *Frederick*, 97 Eng. Rep. 1130 (K.B. 1766). This case, in contrast, involves no deliberate misconduct on the part of Apache, which indisputably did not intend to cause anyone personal injury and indeed neither intended nor foresaw even the economic injuries that were suffered.

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[11] The Moores were residing in Dallam County — over 100 miles from the well site. Mrs. Cole was living in Gray County, a substantial distance from Allison.

2. The punitive damages bear no relationship to the degree of reprehensibility of the misconduct.

As in *BMW*, the conduct for which Apache is being mulcted must be placed on the low end of the reprehensibility spectrum. Specifically, Apache has been fined $4.5 million ($1.5 million of which remains at issue) for no more than "gross negligence." This was not an intentional tort, and there is not even the slightest argument that the punishable conduct involved malice, whether actual or implied.

As in *BMW*, objective factors that recur in punitive damages litigation indicate that the punishment in this case is not understandably related to the gravity of the misconduct. *First*, as many courts have indicated, evidence that a defendant has comported its conduct to industry custom is a powerful objective indication that the defendant's conduct is not particularly reprehensible.[12] Here, there was substantial

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[12] See, *e.g.*, *Drabik* v. *Stanley-Bostitch, Inc.*, 997 F.2d 496, 510 (8th Cir. 1993) ("[c]ompliance with industry standard and custom serves to negate conscious disregard and to show that the defendant acted with a nonculpable state of mind"); *Alley* v. *Gubser Dev. Co.*, 785 F.2d 849, 856 (10th Cir.) (reversing denial of directed verdict on punitive damages where defendant's conduct was consistent with industry practice), cert. denied, 479 U.S. 961 (1986); *Maxey* v. *Freightliner Corp.*, 665 F.2d 1367, 1378 (5th Cir. 1982) (en banc) (finding a $10 million punitive award excessive and remanding for further consideration in light of fact that defendant's design comported with designs of all other members of the industry), appeal on remand, 722 F.2d 1238, 1242 (affirming remittitur of punitive award to $450,000), modified on other grounds, 727 F.2d 350 (5th Cir. 1984); *Liesener* v. *Weslo, Inc.*, 775 F. Supp. 857, 862 (D. Md. 1991) ("it is not reckless conduct for manufacturers to follow accepted industry standards, even if counsel has urged a more cautious approach"); *BMW of North America, Inc.* v. *Gore*, 646 So. 2d 619, 627 (Ala. 1994), cert. granted, 115 S. Ct. 932 (1995) ("evidence of adherence to industry practice bears importance on the question whether the defendant has acted in good faith and is therefore not subject to exemplary damages"); *Lane* v. *Amsted, Indus., Inc.*, 779 S.W.2d 754, 759 (Mo. Ct. App. 1989) ("[c]ompliance with industry standard and custom impinges

evidence that the Key 1-11 well was drilled in accordance with industry custom. Specifically, it is undisputed that Apache obtained the best available testing for the production tubing (Tr. 1500, 1578-1579, 2632-2633) and contracted for the standard tests for the casing (Tr. 2680-2682). It also is undisputed that the contractor that ran the tubing down the well followed the "common procedure." Tr. 2634, 2638. In addition, Apache's expert testified that the method by which the casing was strung together actually exceeded industry standards. Tr. 2682-2688.[13] Finally, Apache's expert further testified that, in wells of this depth, leaks are a regular occurrence and that the safest course is *not* to pull the entire three miles of tubing and start again (with no assurance that a leak will not occur in the newly installed tubing) but rather to put a pressure relief valve on the well. Tr. 2655-2656, 2732-2737. According to that expert, "the decision that Apache made was a decision that *every* operator that I've worked with in the Anadarko Basin would have made under

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to prove that the defendant acted with a nonculpable state of mind * * * and hence to negate any inference of complete indifference or conscious disregard for the safety of others"); see also *Zaccone* v. *American Red Cross*, 872 F. Supp. 457, 462 (N.D. Ohio 1994) (undisputed evidence that blood bank comported its conduct to industry procedures defeats negligence claim where there is no evidence that the industry "'lagged behind' in adopting reasonably prudent measures to protect the blood supply"); see generally Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 40-41 (1982) ("[r]arely will an entire industry act with flagrant impropriety against the health and safety of the consuming public, and running with the pack in general should shield a manufacturer from later punishment for conforming to the norm").

[13] Respondents' expert testified that the contractors had placed too much torque on the casing joints when screwing them together. Tr. 1515-1520. Apache's expert testified that the contractors used the precise amount of torque specified by the proprietary technology they were applying. Tr. 2688.

the same or similar circumstances." Tr. 2735 (emphasis added).

Second, while we do not ask this Court to review the conclusion that Apache employees were guilty of gross negligence justifying some amount of punitive damages, there was a genuine dispute among experts in this case as to whether many of the actions taken by Apache, on which plaintiffs relied for the finding of gross negligence, were imprudent at all. For example, although respondents' expert made contrary assertions, Apache's expert testified that the failure to test the casing after drilling out the cement was not negligent, that it was perfectly reasonable to use a relief valve rather than reworking the well after discovering pressure on the backside, and that there was nothing wrong with Apache's choice of settings for the relief valve. Tr. 2704-2705, 2732-2737, 2745-2746. See also Tr. 2634, 2638, 2655, 2692, 2730 (testifying that various other actions and decisions in the course of drilling the well were not negligent). Several courts have indicated that the existence of this kind of genuine disagreement among experts tends to undermine a finding that a defendant's conduct was so beyond the pale as to justify any liability for punitive damages.[14] At a minimum, the inescapable conclusion is that respondents barely surmounted

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[14] See, *e.g.*, *Satcher* v. *Honda Motor Co.*, 52 F.3d 1311, 1316-1317 (5th Cir. 1995) (reversing punitive damages in case involving failure to utilize a leg guard on motorcycles where the evidence established, among other things, that "there is a genuine dispute in the scientific community as to whether leg guards do more harm than good"); *AMPAT/Midwest, Inc.* v. *Illinois Tool Works Inc.*, 896 F.2d 1035, 1044 (7th Cir. 1990) (affirming district court's order setting aside punitive damages in part because the evidence reflected that there was a disagreement among experts as to the gravity of defects in the product at issue); *Loitz* v. *Remington Arms Co.*, 563 N.E.2d 397, 407 (Ill. 1990) (setting aside punitive damages in part because "the parties' expert witnesses disagreed on the safety and suitability of the material used by Remington in the production of" the product at issue).

the gross negligence threshold, not that they made out a case of reprehensible misconduct justifying a huge punishment far exceeding their actual injuries.

Even putting aside these important objective indicia of nonreprehensibility, the most that could be said of the conduct at issue here was that it involved an isolated instance of inattentiveness and/or bad judgment by low-level employees in the drilling of a gas well.[15] There was not a stitch of evidence that Apache management authorized the employees to perform their jobs improperly or to make decisions that imperiled Apache's investment. And although the intervenor-plaintiffs managed to infect the trial with mountains of inflammatory evidence of kickbacks (which, as we have explained, had only the most attenuated relationship to the blowout), there can be no question that management neither participated in that scheme nor approved it once it learned of it. As Justice Kennedy and Justice White each has observed, a seven-figure exaction that is disproportionate to the actual and potential harm to the plaintiffs is constitutionally suspect when the conduct being punished is not part of a broader pattern of misconduct, is not deliberate, and is not authorized or endorsed by management. See *TXO*, 113 S. Ct. at 2726 (Kennedy, J., concurring); *Pulla*, 72 F.3d at 660.

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[15] Although the court of appeals held that the jury was entitled to find that Terry Tate, a field production foreman, was a "vice-principal" for purposes of Texas law relating to respondeat superior liability for punitive damages (App., *infra*, 23a), that state-law characterization does not control the federal excessiveness inquiry. As field production foreman, Tate was responsible for hookups of drilled wells and for supervising pumpers. *Id.* at 10a, 23a. That comparatively low-level supervisory job simply is not a management position in the sense that the individual may be said to act for the company as a whole for purposes of determining the company's level of culpability.

3. The punitive damages cannot reasonably be said to be needed for proper deterrence.

Finally, there is one overriding consideration that makes this award especially absurd from the standpoint of the deterrence objective of the punitive sanction: the fact that *the principal victim of Apache's alleged gross negligence was the company itself.* Thus, to the extent the quality of work at the well was affected by the kickback scheme, it was Apache that was likely to suffer from that reduction in quality. It was Apache's money that was being used to pay the contractors, and it was Apache's gas that was at risk of being lost if a blowout occurred. In fact, as the Court of Appeals acknowledged, Apache and Meridian lost gas valued at close to $70 million. Moreover, Apache had to spend roughly $45 million to fix the damage. Given the grave risk of economic harm faced by Apache and the mammoth losses it actually suffered, it is ludicrous to suggest that *any* amount of punitive damages — let alone the $4.5 million exaction imposed by the jury (or the $1.5 million remaining to be paid to the three respondents) — is necessary or appropriate to induce Apache and similarly situated companies to act responsibly in the management of their wells.

* * * * *

In view of these considerations, it is difficult to escape the conclusion that the punitive damages in this case are grossly excessive. Accordingly, if the Court finds the punitive damages in *BMW* to be excessive, it should grant Apache's petition, vacate the decision below, and remand for further consideration in light of *BMW*.

If the Court does not reach the excessiveness issue in *BMW*, we submit that this case would be an excellent one in which to address that exceedingly important and recurring issue. The Court of Appeals' open-ended treatment of "potential" harm conflicts squarely with the more limited scope given to that concept by the Eighth Circuit in *Pulla*.

The case accordingly would provide the Court with the opportunity to clarify the circumstances in which "potential" harm can be used to support a punitive verdict. Moreover, the case involves certain objective indicia of nonreprehensibility — particularly, strong evidence of compliance with industry custom and good-faith disagreement among experts about whether Apache was even negligent — that make it a good vehicle for refining the determination of whether a punishment is proportionate to the misconduct. Finally, unlike most of the pending petitions that present excessiveness issues, this case involves a single, non-intentional tort committed by low-level employees. Because it is, in this regard, the polar opposite of *TXO*, this case provides a unique opportunity to continue shaping "the character of the standard that will identify unconstitutionally excessive awards" (*Honda Motor Co.* v. *Oberg*, 114 S. Ct. 2331, 2335 (1994)).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

JESS H. HALL, JR.
JAMES E. ESSIG
JEFF WEEMS
Liddell, Sapp, Zivley, Hill & LaBoon, L.L.P.
3300 Texas Commerce Tower
Houston, TX 77002
(713) 226-1200

ANDREW L. FREY*
EVAN M. TAGER
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0602

Counsel for Petitioner
* *Counsel of Record*

MARCH 1996

APPENDIX A

APACHE CORPORATION, Appellant,

v.

Leo MOORE, Daisy Moore, and Bess Cole, Appellees.

No. 07-93-0069-CV.

Court of Appeals of Texas,
Amarillo.
July 29, 1994.
On Motion for Rehearing
Oct. 20, 1994.

Before REYNOLDS, C.J., and BOYD and POFF, JJ.

REYNOLDS, Chief Justice.

A jury found Apache Corporation liable for actual and exemplary damages resulting from its negligence proximately causing a gas well to blow out. A portion of the damages were allocated to Leo Moore, Daisy Moore, and Bess Cole, designated as the Moore group, who are royalty interest owners in tracts adjoining the location of the well, and who intervened in the litigation as plaintiffs. By this appeal, Apache complains of the damages awarded to these plaintiff-intervenors.

As to these intervenors, Apache challenges (1-2) the legal sufficiency of the evidence to support their actual and exemplary damage awards, (3) the segregation of attorney's fees as a separate part of the exemplary damages awarded, (4) the constitutionality of the Texas scheme of awarding exemplary damages, and (5) the admission of testimony by an expert witness unidentified by, but presented on behalf of, Daisy Moore. On the rationale expressed, the judgment will be modified to eliminate the attorney's fees allocated to the intervenors and, as modified, affirmed.

In January of 1981,[1] the Elk City, Oklahoma office of Apache, working as operator, was responsible for drilling and spudding one of the deepest wells, more than 16,000 feet, in the Anadarko Basin in Wheeler County, Texas, the Key 1-11 well. Apache, together with El Paso Exploration Company, now known as Meridian Oil Production, Inc., and referred to as Meridian, were each 50% working interest owners of the Key 1-11 well.

Ratliff Drilling Company was hired by Apache to drill the well. Although Apache maintained Ratliff was an independent third party, the evidence showed that Apache controlled the Ratliff employees in the drilling operation, its drilling superintendent took charge of the well, and was ultimately responsible for the safe and proper drilling of the well.

During the drilling of the well, metal shavings were found in the drilling mud. The testimony at trial showed that metal shavings were often indicative of worn out casings or tubing allowing the metal of the drilling pipe to rub and shave off, thereby weakening the equipment in the hole. No logs or tests were run to determine the origin or cause of the metal shavings.

In July, the well experienced a "kick," *i.e.*, the well began to flow, causing cement, which had been placed to secure the liner at the bottom of the hole, to back up through the hole into the intermediate casing, where it hardened. The well was being attended by employees of Ratliff at the time of the kick since no one from Apache was present on the well-site. Although someone from Apache was to be present on the well 24 hours a day, no one could be reached for assistance for several hours after the kick occurred.

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[1] All dates referenced are in the calendar year 1981 unless otherwise indicated.

After the cement was drilled out of the casing, no tests were conducted to determine whether the casing had been damaged. Upon completion and perforation of the well, a pressure leak occurred at the surface, denoting pressure on the backside of the well, which placed the intermediate casing under stress. Ignoring its drilling superintendent's recommendation to pull the tubing and repair the leak, Apache conducted a single test to determine the source of the leak, but did not find it.

Without any further effort to determine the source of, or to repair, the leak, despite knowing the leak would create pressure and place stress on the intermediate casings, Apache shut in the well in July to await connection to a pipeline. To relieve pressure on the well due to the leak, Apache had Axelson, Inc., a company which manufactured and marketed pressure relief valves for oil wells, install a casing relief valve on the well.

Originally, the relief valve was set up to use outside air to function, but when that system became unworkable, two nitrogen bottles were installed. Apache admittedly knew that without a flow of nitrogen, the valve would not operate, and if the valve became inoperable, the pressure in the well would continue to build, making the likelihood of a blowout a reality. Ralph Walker, Apache's drilling superintendent, directed that the valve be set to relieve pressure when it reached 7,000 pounds, and cut off when the pressure was relieved to 6,000 pounds. There was testimony that the settings were inordinately high.

On October 4, the well blew out. The expert testimony, including that presented by Apache, was that the relief valve had not been in proper working order for approximately two weeks prior to the blowout. There was conflicting testimony concerning whether the nitrogen flow was hooked up to the relief system at the time of the blowout. Although there were differing theories as to the exact cause of the blowout and which portion of the well failed first, it was the overall

consensus that, in all likelihood, the pressure from the leak built to more than 10,000 pounds, causing the seven and five-eighths inch casing to rupture.

Fortunately, no one was present at the well at the time of the blowout, but the well proceeded to vent, flare, dissipate, and waste natural gas at a significant rate until Apache was able to divert the gas into a pipeline of the Key number 3 well in June of 1992. The Key 1-11 well continued to flow as a result of the blowout until it was killed on 9 February 1993. In terms of the gas lost, the blowout was believed to be the largest gas well blowout in United States history, there being 14.3 billion cubic feet of gas drained from the reservoir, and the total value of the gas wasted was approximately 69 million dollars. Apache received approximately 41 million dollars for the gas it captured from the well from June, 1992 until the well was killed in February, 1993.

As a result of the blowout, Arkla Exploration Company and Stevens Production Company brought suit against Apache and Meridian seeking recovery for conversion of gas diverted from the neighboring Kiker No. 2-1 well, and for negligence. Subsequently, Apache and Meridian brought third party actions against Babcock & Wilcox Company, Hydril Company, Sooner Pipe and Supply Corporation, Axelson, Inc., and U.S. Industries, Inc., alleging that products manufactured by them were responsible for the blowout. The Scott group—comprised of Tom L. Scott, Inc., George S. Johnson, Sunshine Exploration Company, W.W. Braden, III, and Canyon Energy, Inc.—and the Moore group—comprised of Leo Moore, Daisy Moore, and Bess Cole—joined the suit as plaintiff-intervenors.

Claims of negligence and gross negligence against Apache stemmed from allegations that Apache company men working on the Key 1-11 well took kickbacks in the forms of money, cocaine, alcohol, prostitutes, and the like, in exchange for giving work to various companies, specifically

White Stripe Inspection Company, which affected the quality of their work and their diligence and vigilance in operating the well.[2] Apache was aware, prior to the blowout, that kickbacks were being taken by its employees, and formed an investigation team to determine the extent of the kickbacks.[3]

In the time intervening between the original petition, filed in January of 1982, and the selection of the jury in the summer of 1992, all parties except Apache, Meridian, third-party defendant Axelson, the Scott group, and the Moore group had settled their controversies. Before the trial on the merits, Axelson settled its controversies and, as part of that settlement, agreed to pay attorney's fees for the Scott group.

In addition to evidence of the earlier recounted events, the jury had for its consideration this alphabetical cast of pertinent characters and their roles in connection with the Key 1-11 well:

> Andy Atchley—a "worm" for Ratliff, was sent to get metal shavings found in the well while it was being drilled. He saw Apache use bent pipe in the hole, and testified that after the

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[2] These allegations spawned two mandamus actions leading to discovery of the kickbacks and testimony of expert witnesses. *Axelson, Inc.* v. *McIlhany*, 798 S.W.2d 550 (Tex. 1990); *Tom L. Scott, Inc.* v. *McIlhany*, 798 S.W.2d 556 (Tex. 1990).

[3] White Stripe sued Apache for unpaid invoices. Apache successfully counterclaimed, alleging White Stripe paid kickbacks to Apache employees, which affected the diligence and vigilance of their work. A portion of the evidence at the trial in this instance was taken from depositions, attorney arguments, and investigations conducted in connection with the White Stripe litigation, wherein Apache took the position that the kickbacks adversely affected the work of its employees.

kick, he thought the Key 1-11 well was a "time bomb waiting to go off."

Gordon Clower—drilling foreman for Apache, was responsible for drilling the well and conducting all operations on the well after spudding. Clower was supposed to have been on the well site when the kick occurred, but was absent. Statements by Ralph Walker and others indicated Clower was not capable of handling the responsibilities given him by Apache; there was evidence that he was frequently drunk or incoherent on the job and that the Elk City office was aware of his problem with alcohol.

Bill Conner—drilling manager for Ratliff, testified Apache used crooked pipe in the hole and chose not to use drilling rubbers which would have kept the casings from wearing out. Ratliff hired Jim Gerlach over Conner's objections; Gerlach was inexperienced and drank on the job. Ralph Walker often left Gerlach alone and in charge of the well despite Walker's own testimony that Gerlach was not as knowledgeable as he should have been.

Earl Wayne Eller—who "dogged" Ralph Walker's heels but was never formally trained, was put in charge of drilling and completing wells for Apache. Upon Ralph Walker's orders, he ordered the Axelson relief valve after the kick. Eller described the effects of kickbacks on the Key 1-11 well prior to the blowout as "twenty four hours in paradise," and admitted, "Oh, I guess when I was using [cocaine], I always worked a little bit better with a nose full of coke." Eller is currently a recovering cocaine addict.

Jim Gerlach—toolpusher for Ratliff, testified that at the time of the kick, no one from Apache was present on the well site, so he handled the situation until Ralph Walker arrived several hours later. Against ordinary custom, the Key 1-11 well was built without pre-construction meetings, and was built as they "went along." Prior to the kick, Gerlach found metal shavings in the drilling mud and reported his findings to Ralph Walker; although ordinary practice was to run logs to determine the source of the metal shavings, such was not done in this instance. After the discovery of the leak, Gerlach suggested Apache kill the well and pull the tubing to find the leak, but this was not done.

Darrell Lee McDonel—salesman for White Stripe Inspection Company, saw Apache men drinking when the rig needed attention, knew White Stripe did not perform the inspections invoiced, and knew Apache used unusable pipe in the Key 1-11 well. McDonel testified that the usual practice for a White Stripe inspection was not a good inspection.

Danny Ray Merz—part owner of White Stripe, did business with Gordon Clower and Ralph Walker, and provided kickbacks in the form of alcohol, cocaine, prostitutes, cash, and the like to Apache employees on the site of the Key 1-11 well, as well as other locations, during working hours both before and after the blowout. Merz testified that he had seen Clower drunk or incoherent on the well during working hours, and had seen Terry Tate drunk or on drugs on site and on duty. He also testified that Tate reported the leak in the well

to the Tulsa office of Apache prior to the blowout, but nothing was done about it, and Tate felt that a hole in the tubing resulting from the kick was the ultimate cause of the blowout. Merz was ultimately convicted of tax fraud, tax evasion, and mail fraud in connection with the kickback scheme devised by White Stripe and Apache employees.

Carmen Neece—sectary/receptionist for Apache, was asked to inform Apache's kickback investigation team of the events in the Elk City office and on the Key 1-11 well. She testified that Tom Reames would estimate the pressures and phone in false daily reports because he did not go out to the well everyday, and that he was eventually fired because he "had not been on location for four days," and the well "had pressured up and blown out." Her spying revealed that Gordon Clower's drinking was obvious and his superiors in the Elk City office were aware of it, and there was widespread use of kickbacks in the form of cocaine on the Key 1-11 well. She further testified that Douglas Storts asked her to destroy bills from vendors to Apache.

Al Perlin—former in-house counsel for Apache, conducted an investigation of kickbacks taken by Apache employees in 1982; however, he was aware of such investigations by Apache as early as 1980. Perlin testified that the law presumes kickbacks affect the way people perform their jobs. He testified that, as operator, Apache was charged with the responsibilities of (1) properly drilling the well, (2) safety, and (3) hiring competent companies to work on the well. His investigation showed

that both the Tulsa and Elk City offices were "on the take" and Douglas Storts was supplied with cocaine by Donnie Snapp, therefore, Storts would not fire Snapp.

Gregory L. Pyles—was hired by Apache in 1984 to investigate kickback operations and verify the use of kickbacks by Apache employees. He discovered there was drug use on the Key 1-11 well and there were inflated invoices for work on the well. He verified that Apache employees working on the Key 1-11 well used drugs and participated in kickback schemes prior and subsequent to the blowout.[4]

Tom Reames—pumper for Apache, checked the Key 1-11 well 12 to 15 times between September and the blowout of the well in October, but did not check casing pressure or the pop-off valve on the relief system, and did not report to anyone his readings on the tubing pressure or that he heard gas leaking from the well after it was shut in. Reames testified he was instructed by Tate to check the well for missing property, but was not advised to check or report the pressures, nor to check the connection of the nitrogen bottles, and would not have known what he was looking for had he been told to check the gauges.

Donnie Snapp—drilling foreman for Apache out of the Tulsa office, was implicated by testimony to have been heavily involved in kickbacks

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[4] Virtually all Apache employees who were involved in the kickback scheme on the Key 1-11 well, many of whom are identified in this opinion, pleaded guilty to criminal offenses charged in connection with the kickback scheme.

connected with the Key 1-11 well, but when directly questioned, he repeatedly invoked his Fifth Amendment right against self-incrimination. Snapp testified that Apache utilized inexperienced people, and Gordon Clower failed to do his job, and was subsequently fired.

Lloyd Sommers—the person in Apache's Tulsa office who acted as a liaison to the Elk City office and the Key 1-11 operation. He was Ralph Walker's immediate superior. Paul Douglas Storts—drilling manager and petroleum engineer for Apache, had management responsibility for the well and was in charge of the well from its inception. He was involved in the day-to-day evaluation of the Key 1-11 well, but his decisions regarding completion of the well were reviewed by Apache management. Storts theorized that the cause of the blowout was that the tubing failed, causing the casing strings to fail, causing the pipe to fail. He further testified that "Apache had too many well operations and not enough people—people that weren't taking care of their job," and the Key 1-11 well operation "was poorly supervised in the field."

Terry Tate—Apache's production foreman for the Key 1-11 well, was responsible for hookups and pumpers. He admittedly took kickbacks in exchange for work and knew there were fictitious invoices connected with the well, knew there was cocaine readily available at the Key 1-11 well, and knew that kickbacks existed in all oil patches in the 1980's. He testified that he wouldn't have anyone on drugs working on the well, but he was taking amphetamines while working on the Key 1-11 well "to stay awake."

> Ralph Walker—former superintendent for Apache in its Elk City district was the drilling foreman on the Key 1-11 well until he was replaced by Gordon Clower after spudding, when Walker became a superintendent. Either Walker or Lloyd Sommers was responsible for Clower's position on the Key 1-11 well. Walker was the first Apache company man on the scene after the kick and he ordered the Axelson relief valve be installed to relieve pressure on the casings. He instructed Terry Tate to check the pressure daily. He testified that from what he knew about wells, he did not see how the nitrogen bottles could have been hooked up at the time of the blowout, and further, Apache did not "have enough hands," and their hands had "a lot of control over how much service work they had, more so than most company men for other oil companies."

The jury found Apache was negligent and grossly negligent in causing the blowout and, resultingly, they awarded a total of $81,282 actual damages, $4,000,000 exemplary damages exclusive of attorney's fees, and $500,000 attorney's fees, to the Scott group and the Moore group.

As material to this appeal, the jury found that of the $81,282 actual damages, Leo Moore and Daisy Moore each were entitled to $2,705, and Bess Cole was entitled to $5,425, to compensate them for the value of natural gas and condensate attributable to them which flowed from the Key 1-11 well bore. The jury found that the $4,500,000 exemplary damages and attorney's fees should be apportioned in 12.5% increments to each member of the groups, thereby awarding each member of the Moore group $562,500.[5]

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[5] The jury also made findings of, and awards for, conversion,

Following the trial and the jury's verdict, but before judgment was rendered by the trial court, the Scott group dismissed with prejudice all of their claims against Apache and Meridian. Only Apache has appealed, and its appeal is only from the judgment rendered in favor of the Moore group.

Apache presents seven points of error, most of which have subpoints. By its main points, Apache contends that (1) there is no evidence in support of the proper measure of damages; (2) the evidence is legally insufficient to support the award of exemplary damages; (3) the exemplary damage award violates the Texas and United States Constitutions; (4) the trial court erred in failing to remit the jury's grossly excessive award of exemplary damages; (5) the trial court's failure to instruct the jury to consider the gross negligence of specific Apache employees was reversible error, thereby permitting the jury to punish Apache for conduct it did not commit, sanction or ratify; (6) the trial court's separate submission of exemplary damages attributable to attorney's fees was reversible error; and (7) the trial court erred in allowing the testimony of an undesignated expert. We will discuss Apache's contentions of error in logical consecution, with the development of the underlying facts as necessary.

The trial court asked the jury to find, and the jury found, the value of the gas and condensate attributable to the Moore group that was lost as a result of the blowout. In initially contending there is no evidence in support of the proper measure of damages, Apache, relying upon *Kraft* v. *Langford*, 565 S.W.2d 223, 227 (Tex. 1978), submits that the Moore group's royalty interests are interests in real property, and that their injuries from the blowout were permanent injuries to realty, for which the one and only proper measure

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but failed to find the conversion was wrongful or intentional. The Moore group elected to pursue only the negligence claims.

of damages is the difference in market value of the Moore group's royalty interests before and after the blowout. Since the only evidence of damages presented was the value of gas lost, and there was no evidence of the before and after difference in market value of the royalty interests, Apache concludes the Moore group did not evidence the proper measure of damages and, therefore, the jury's award for actual, as well as for exemplary, damages must fail.[6]

Apache's contention that the Moore group's injuries were permanent injuries to realty and subject to a single measure of damages is supported in part by the holding in *Texon Drilling Co.* v. *Elliff*, 210 S.W.2d 553 (Tex. Civ. App.—San Antonio 1947), *rev'd and remanded, sub nom. Elliff* v. *Texon Drilling Co.*, 146 Tex. 575, 210 S.W.2d 558 (1948). The factual situation in *Elliff* mirrors that in the present litigation in that a gas well blowout on land adjacent to land in which the Elliffs owned royalty interests, alleged to have been caused by Texon's negligence, drained gas and distillate from under the Elliffs' land and allowed the gas and distillate to escape into the air. The litigation produced opinions upon

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[6] Parenthetically, it is noticed that prior to the submission of the issue of the Moore group's actual damages to the jury, Apache requested an issue utilizing the same measure of damages, *i.e.*, the value of gas lost, to be given in connection with its third-party action against Axelson. Apache's requested issue wouid ordinarily waive any error in the submission of the identical issue, see *Northeast Texas Motor Lines* v. *Hodges*, 138 Tex. 280, 158 S.W.2d 487, 488 (1942), because Apache cannot invite error by requesting an issue and then objecting to its submission. *General Chemical Corp.* v. *De La Lastra*, 852 S.W.2d 916, 920 (Tex.), *cert. dism'd*, ___ U.S. ___, 114 S.Ct. 490, 126 L.Ed.2d 440 (1993). However, since Apache's submission was not made in response to the submission given, and Apache raised sufficient objections to the Moore group's submission, Apache is entitled to have its contention resolved.

which both parties in the present litigation rely to some extent.

In the trial court, the Elliffs recovered damages for the amount of the gas and distillate which had been drained from their property as a result of the blowout. On appeal, the intermediate court of civil appeals was called upon to determine whether the recovery allowed the Elliffs was based upon a proper theory of recovery. 210 S.W.2d at 554. In determining the theory was not supported by Texas law, *id.* at 555, the court reasoned that since the nature of Elliffs' action was one for damages to realty, the damage issues submitted were evidentiary and not controlling, and the submission was error because recovery for lost gas was barred by the law of capture. *Id.* at 556-57. In that court's opinion, the rule that where land is permanently injured the usual measure of damages is the depreciation in value occasioned by the wrongful act, was applied to mineral estates. *Id.* at 557. Thereupon, the court reversed the trial court's judgment and remanded the matter for a new trial without reaching Texon's remaining points of error. *Id.* at 557-58.

Upon further appeal, the Supreme Court determined the intermediate appellate court was without authority to pass upon the propriety of the measure of damages since no such assignment of error had been presented in that court, and, as a consequence, the Court declined to express an opinion on that question. 210 S.W.2d at 560. In so doing, the Court recognized that the difference between fair market value of royalty interests before and after a blowout is not, as Apache contends, the exclusive measure of damages for injuries so suffered; indeed, the Court held that the Elliffs were entitled to recover such damages as would reasonably compensate them for the loss sustained as the proximate result of Texon's negligent conduct. Pointedly, the Court stated that it could not affirm the judgment of the trial court because Texon had challenged the sufficiency of the evidence to support the

amount of damages the jury found, and had charged the verdict was excessive, complaints over which the Court had no jurisdiction. *Id.* at 563.

Upon remand, the intermediate appellate court viewed the Supreme Court's opinion as deciding that the Elliffs "could recover as and for the taking and destruction of gas and distillate which [the Elliffs] owned or in which they had a property interest," and their damages would not be governed by the measure of damages relating to real property. *Texon Drilling Co.* v. *Elliff*, 216 S.W.2d 824, 830-31 (Tex. Civ. App.—San Antonio 1948, writ ref'd n.r.e.). Thus, Apache's contention that the Moore group's damages must be governed by the measure of damages for injury to real property fails, together with its notion that there is no evidence to support the "proper measure of damages" since the "proper measure" was not submitted.

Moreover, we are of the opinion that the Moore group's injuries were not permanent. Permanent injuries to land give rise to a cause of action for permanent damages which are normally measured as the difference in the value of the property before and after the injury. Temporary injuries give rise to temporary damages, or the amount of damages which accrued during the continuance of the injury covered by the period for which the action is brought. *Bayouth* v. *Lion Oil Co.*, 671 S.W.2d 867, 868 (Tex.1984). The proper measure of damages is dependent upon whether the injury to the realty is permanent or temporary in nature. *Kraft* v. *Langford*, 565 S.W.2d at 227.

The characterization of an injury as either permanent or temporary is determined by its continuum. Permanent injuries to land result from an activity of such a character, and existing under such circumstances, that it will be presumed to continue indefinitely; the injury must be constant and continuous, not occasional, intermittent or recurrent. *Atlas Chemical Industries, Inc.* v. *Anderson*, 524 S.W.2d 681, 684 (Tex. 1975). Temporary injuries result

where the injury is not continuous, but is sporadic and contingent upon some irregular force such as rain. *Bayouth* v. *Lion Oil Co.*, 671 S.W.2d at 868.[7]

Although the blowout effectively ceased production from the Key 1-11 well, when the gas was diverted to the Key number 3 well pipeline, the injury to the Moore group was terminated. An injury which can be terminated cannot be a permanent injury. *Kraft* v. *Langford*, 565 S.W.2d at 227.

The proper measure of damages for temporary injuries to realty is the amount of damages which accrued during the continuance of the injury. *Id.* By their action, the Moore group sought recovery only of the gas lost during the occurrence of the blowout, *i.e.*, their injuries were contingent upon the irregular force of the blowout, and they sought recovery for damages which accrued during the blowout. For these reasons, Apache's first point of error is overruled.

Utilizing a three-prong-attack in its second point of error, Apache challenges the legal sufficiency of the evidence to support the jury's award of exemplary damages to the Moore group. Apache contends that (1) evidence of ordinary negligence is inadequate as a matter of law to support a finding of gross negligence, (2) the Moore group did not prove a culpable mental state necessary to support the award,

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[7] We recognize, as Apache urges in contending for permanent injury to realty, that the blowout and its ensuing consequences were not subject to an injunction. *Cf. Neely* v. *Community Properties, Inc.*, 639 S.W.2d 452, 454 (Tex. 1982) (whether damage is permanent or temporary may depend on whether an injunction would be successful). However, the possibility of a successful injunction is merely a factor to be considered in determining whether the injury is temporary or permanent, and the unavailability of a successful injunction does not necessarily change a temporary injury into a permanent one. *City of Odessa* v. *Bell*, 787 S.W.2d 525, 530 (Tex. App.—El Paso 1990, no writ).

and (3) the disloyalty of some Apache employees cannot be attributed to Apache.

In an effort to guide Texas practitioners through the murky waters of exemplary damages, our Supreme Court, in *Transportation Insurance Company* v. *Moriel*, 879 S.W.2d 10 (Tex. 1994), explored the dichotomy between the exhortation to look at all of the surrounding facts to determine whether a defendant was grossly negligent, *Burk Royalty Co.* v. *Walls*, 616 S.W.2d 911, 919 (Tex. 1981), and the traditional no evidence review which constrains reviewing courts to look only at the evidence favoring the verdict. *Transportation Insurance Company* v. *Moriel*, 879 S.W.2d at 20. The Court ultimately resolved the conflict by its determination that the test for gross negligence contains both objective and subjective components, *id.* 879 S.W.2d at 21-22, *i.e.*, before a gross negligence finding can be sustained, the evidence must show both that the act was likely to result in serious harm, and that the defendant was consciously indifferent to the risk of harm. *Id.* at 892, 879 S.W.2d at 22-23.

Thus, our duty is to look at all of the surrounding factors attributable to the exemplary award, set forth in detail those facts which support the award, and make a determination whether there is legally sufficient evidence to support the objective and subjective components and the finding.

Because the jury found Apache grossly negligent, Apache has the burden of establishing there was no evidence to support the finding. *Burk Royalty Co.* v. *Walls*, 616 S.W.2d at 920-21. Even where there is evidence of an entire want of care and also evidence of "some care," the jury's finding of gross negligence through an entire want of care resolves the issue, and we are bound by the finding in testing for legal sufficiency. *Id.* at 921. The finding of gross negligence will be upheld if there is legally sufficient evidence that (1) the defendant's conduct created an extreme risk of harm, and (2) the defendant was aware of the extreme risk. *Wal-Mart Stores, Inc.* v. *Alexander*, 868 S.W.2d 322, 326 (Tex. 1993).

In considering whether the evidence is legally insufficient, we will review the entire record to determine whether there is more than a scintilla of evidence to support the finding, *Garza* v. *Alviar*, 395 S.W.2d 821, 823 (Tex. 1965), and if so, the finding will be upheld. *Stedman* v. *Georgetown S. & L. Ass'n*, 595 S.W.2d 486, 488 (Tex. 1979). Evidence is merely a scintilla when it is so weak as to do nothing more than create a mere surmise or suspicion of a fact. *Seideneck* v. *Cal Bayreuther Associates*, 451 S.W.2d 752, 755 (Tex. 1970). In evaluating legal sufficiency, we are required to determine whether the proffered evidence as a whole rises to a level which would enable reasonable and fair-minded people to differ in their conclusion. Accord *McDonough* v. *Zamora*, 338 S.W.2d 507, 515-16 (Tex. Civ. App.—San Antonio 1960, writ ref'd n.r.e.). If the evidence is legally sufficient, we will not reverse the trial court's judgment.

Apache contends evidence of the actions involved did not rise to the level of gross negligence. No exact line can be drawn between negligence and gross negligence; the character of the actual act required is determined by the terms used to define "gross negligence."

Gross negligence has been defined as that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the rights or welfare of the person or persons to be affected by it. *Burk Royalty Co.* v. *Walls*, 616 S.W.2d at 920.[8]

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[8] We recognize that the most recent version of *Transportation Insurance Company* v. *Moriel*, revised the definition of gross negligence to correspond with the statutory definition in Texas Civil Practice & Remedies Code Annotated § 41.001(5) (Vernon Supp. 1994). However, we will apply the definition of gross negligence in effect at the time of the trial of this cause, particularly since there were no confrontations concerning the definition of gross negligence at that time.

Gross negligence differs from ordinary negligence in that the defendant must be "consciously indifferent," and the conduct must create an extreme degree of risk. *Wal-Mart Stores, Inc.* v. *Alexander*, 868 S.W.2d at 326.

The requirement of an extreme degree of risk is not satisfied by a remote possibility of injury or even a high probability of minor harm, but rather, the likelihood of serious injury to the plaintiff. *Id.* In other words, only if the defendant's act or omission is unjustifiable and likely to cause serious harm can it be gross negligence. *Transportation Insurance Company* v. *Moriel*, 879 S.W.2d at 21-22.

Ordinary negligence is raised to the level of gross negligence by the mental attitude, *i.e.*, the conscious indifference, of the defendant to the rights, welfare and safety of others. *Rainbow Exp., Inc.* v. *Unkenholz*, 780 S.W.2d 427, 429 (Tex. App.—Texarkana 1989, writ denied). The distinguishing factor between negligence and gross negligence is the degree of risk of which the defendant was, or should have been, aware. *Williams* v. *Steves Industries, Inc.*, 699 S.W.2d 570, 572 (Tex. 1985). The focus of our review is on the mental attitude of the company charged, and whether the acts or omissions displayed a conscious and deliberate disregard for the interest or safety of others. *Dyson* v. *Olin Corp.*, 692 S.W.2d 456, 457-58 (Tex. 1985).

A plaintiff may prove a defendant's gross negligence by proving the defendant had actual subjective knowledge that his conduct created an extreme degree of risk. *Transportation Insurance Company* v. *Moriel*, 879 S.W.2d at 22-23. The evidence in the present instance shows Apache had actual knowledge that acts and omissions (in the form of kickbacks) attributable to it created an extreme degree of risk, yet, Apache consciously disregarded those risks.

The parties differ as to the significance of the evidence that Apache knew its employees were taking kickbacks. The Moore group contends evidence of Apache's knowledge of

the kickback scheme indicated Apache knew the effects of kickbacks on the quality of work on the Key 1-11 well, and knew that White Stripe did not conduct the required tests on the pipe in the well, yet allowed the pipe to be fitted down the hole. Apache contends it had no knowledge of the kickbacks on the Key 1-11 well until after the blowout, and the majority of the evidence related to kickback activities was during the time after the blowout; therefore, evidence of such activities could not have served as evidence of gross negligence in connection with the blowout.

The record reveals that Apache began investigating allegations of kickback activities as early as 1980. Although the investigations did not include the Key 1-11 well specifically, since it was not drilled until 1981, there was testimony that kickbacks were so widespread in the 1980's that men who worked in the oil patches knew of available kickbacks on Apache wells, including the Key 1-11 well, prior to taking jobs on the Key 1-11 well. Apache's former in-house counsel testified that the law presumes kickbacks affect the way people perform their jobs.

Even discounting the evidence of kickbacks, there is legally sufficient evidence from which the jury could have found gross negligence as differentiated from ordinary negligence. The record reveals that Apache management decided not to run logs or tests to determine whether the casings had been worn or damaged by the drilling out of cement following the kick. Apache knew the Key 1-11 well had a leak and, despite contrary recommendations, decided to shut in the well without fixing the leak. Apache had actual knowledge that the relief valve needed a steady flow of nitrogen to operate properly and prevent the blowout; yet, Apache did not adequately monitor the flow to the system. Moreover, Apache put Clower in charge of the well despite knowledge of his alcohol abuse and other problems related to kickbacks, and allowed the kickback scheme to continue despite knowing, by its own admission, that such activities

affected the quality of its employees' work. This evinces that Apache consciously disregarded the risks associated with the kick and the ensuing leak, circumstances which it knew were capable of causing a blowout. These circumstances passed the "extreme risk" test established in *Transportation Insurance Company* v. *Moriel*, 879 S.W.2d at 22-23.

Apache further contends the Moore group did not prove the requisite mental state to support the imposition of an award of exemplary damages. This is so, Apache submits, because exemplary damage awards based upon injuries to realty are available only when the evidence shows some element of fraud, malice or oppression, and the conduct of the defendant must have been actuated, or accompanied, by some evil intent or result from such gross negligence that the same may be regarded as an intentional injury. *Scurlock Oil Co.* v. *Joffrion*, 390 S.W.2d 526, 532 (Tex. Civ. App.—Tyler 1965, no writ).

The existence of gross negligence need not rest upon a single act or omission, but may result from a combination of negligent acts or omissions, and many circumstances and elements may be considered in determining whether an act constitutes gross negligence. *International Armament Corp.* v. *King*, 674 S.W.2d 413, 416-17 (Tex. App.—Corpus Christi 1984), *aff'd*, 686 S.W.2d 595 (Tex. 1985). The defendant's mental culpability can be inferred from actions and circumstances indicating a state of mind amounting to a conscious indifference. *Transportation Insurance Company* v. *Moriel*, 879 S.W.2d at 22-23; *Burk Royalty Co.* v. *Walls*, 616 S.W.2d at 912.

Augmenting the evidence that Apache failed to see that the nitrogen bottles necessary for the Axelson relief valve to operate were properly monitored, was the testimony of Tom Reames that although he was the Apache company man responsible for checking the well, he was not instructed as to what valve to check, how to check it, or when to check it, nor was he in fact instructed to check the valve. He rarely

went by the well and "never" checked on the nitrogen bottles and would not have known what he was looking for had he checked them. Carmen Neece testified that Reames in fact did not always check the site and falsified his daily reports with the pressures he checked days before.

The jury could have inferred from this evidence that Apache consciously disregarded the safety of the well since it knew the flow of nitrogen was necessary to maintain the relief valve to prevent a blowout. Stated differently, Apache made a decision, in the face of impending harm, not to care about the consequences of its actions which might have, and ultimately did, lead to that harm. *Williams* v. *Steves Industries, Inc.*, 699 S.W.2d at 573.

Third, Apache submits that the disloyalty of a few of its employees cannot be attributed to the company so as to sustain the award of exemplary damages against it. In support of this contention, Apache relies upon the holding in *Fort Worth Elevators Co.* v. *Russell,* 123 Tex. 128, 70 S.W.2d 397 (1934),[9] that exemplary damages may not be assessed against a corporation on a theory of respondeat superior.

The rule set forth in Russell provides that the default for which exemplary damages may be recovered must be that of the corporation; the grossly negligent act must be the very act of the corporation itself or, if the act is that of a mere servant or employee, then it must have been previously authorized, or subsequently must be approved, by the corporation. *Id.*, 70 S.W.2d at 406. In order to impose exemplary damages on a corporation for acts of its agents, there must be evidence not only that the actor was an employee, but also that the agent was a vice-principal employed in a managerial capacity or that the agent was

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[9] An unrelated portion of *Russell* was disapproved in *Wright* v. *Gifford-Hill & Co.*, Inc., 725 S.W.2d 712, 714 (Tex. 1987).

performing an act authorized by the principal or managerial agent, or that the principal ratified or approved the act of the agent. *Id.*

Tate was the company man charged with the responsibility of maintaining the hookups and pumpers. The jury was entitled to determine from the evidence that Tate was engaged in the performance of nondelegable or absolute duties of Apache, and was a vice-principal of Apache as a matter of law. *Rainbow Exp., Inc.* v. *Unkenholz*, 780 S.W.2d at 432.

Reames testified that although Tate told him to check the Key 1-11 well, he did not tell him to check the pressure valves, only to check for stolen property. While Reames made notations of the tubing pressures, he was not required to report his readings to anyone. He further testified that he would not have known whether the readings were safe pressures since Tate did not tell him to check the valve, or for what he was to check.

We see no difference in this situation and that in *Burk Royalty*, where the acts and omissions of negligence and gross negligence ultimately rested in the acts and decisions of a vice-principal of the company who delegated responsibilities to other employees, and our Supreme Court upheld the finding of gross negligence against the company. 616 S.W.2d at 922-24. Resultingly, there was legally sufficient evidence by which the jury could have attributed the actions of Apache's employees to the company. Apache's second point of error is overruled.

By its fifth point of error, Apache contends the trial court's failure to instruct the jury to consider the gross negligence of specific employees was reversible error because it permitted the jury to punish Apache for conduct it did not commit, sanction, or ratify. The basis for, and the only citation in support of, this contention is Apache's reliance upon the wording of Texas Pattern Jury Charges §§ 6.14 and

6.15. Although the Texas Pattern Jury Charges are an excellent aid and guide in formulating jury issues and instruction, they are not intended to state the only appropriate language on a given issue. *Murphy* v. *Waldrip*, 692 S.W.2d 584, 592 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.).

Contrary to Apache's contention, corporations may be held liable without a specific request for a finding that an individual was grossly negligent. See *e.g.*, *International Armament Corp.* v. *King*, 674 S.W.2d 413 (Tex. App.—Corpus Christi 1984), aff'd, 686 S.W.2d 595 (Tex. 1985); *Ford Motor Co.* v. *Nowak*, 638 S.W.2d 582 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.); and *Rawlings Sporting Goods Co.* v. *Daniels*, 619 S.W.2d 435 (Tex. Civ. App.—Waco 1981, writ ref'd n.r.e.). Where a situation does not involve the negligence or intentional act of an employee whose conduct was ratified by company management, but involves complex company policy decisions made by company management, it is proper to hold the company actionable for gross negligence. Accord *Monsanto Co.* v. *Johnson*, 675 S.W.2d 305, 310 (Tex. App.—Houston [1st Dist.] 1984), writ ref'd n.r.e., 696 S.W.2d 558 (Tex. 1985).

The evidence supported a reasonable inference by the jury that Apache management had actual knowledge of the inherent dangers of shutting in a well with a leak. Still, Apache opted to do so. Additionally, Apache knew how to correct the situation without shutting in the leak, but chose not to do so. Apache had knowledge that kickbacks were prevalent on all of their wells and, although they knew kickbacks affected the way people performed their jobs and had launched an investigation into the activities, they failed to take any action to correct the situation, or to place people in charge who were not taking kickbacks or using drugs or alcohol on the job. Such evidence provided a sufficient basis for the jury's conclusion of conscious indifference and the finding of gross negligence against Apache.

As a consequence, the trial court's failure to instruct the jury to consider the gross negligence of individual employees was not error. Apache's fifth point of error is overruled.

By its third point of error, Apache challenges the constitutionality of the exemplary damage award on three grounds. The grounds are that (1) the award was unconstitutional under both the Texas and United States Constitutions because the trial court did not guide the jury in determining the kind of extreme conduct that justifies an award of exemplary damages, thereby denying Apache due process; (2) the award violates both constitutions because it bears no reasonable relationship to the amount of actual damages or severity of the offense; and (3) the award amounts to an excessive fine under the Texas Constitution.

Apache's first challenge, that the trial court did not properly guide the jury in the determination of exemplary damages, is a complaint against the submission of the issue. After a lengthy examination of the voluminous record before us, we have determined nothing has been preserved for our review since Apache did not articulate this complaint to the trial court. *Allen* v. *American National Insurance Company*, 380 S.W.2d 604, 609 (Tex. 1964).

All objections not made to the jury charge before it is read to the jury are waived. Tex. R. Civ. P. 272. The objection must point out distinctly the objectionable matter and the grounds therefor. Tex. R. Civ. P. 274.

In its Reply Brief, Apache directs our attention to a portion of the statement of facts (pages 4233-37), which it alleges addresses its constitutional objections. We have read those pages, as well as the other 5000 plus pages of the statement of facts, and we do not agree that the constitutionality of the submission was specifically challenged on the grounds presented by this appeal. The objection was voiced as:

> Third, Your Honor, this issue is objectionable because it is unconstitutional. This issue, as worded, encourages exemplary damages to be awarded as compensation. This statement just unabashedly ignores the only constitutional underpinning for punitive damages; *i.e.*, to deter conduct by punishing the defendant. The current wording of this issue is the part one, where it states: Other than as compensation for attorneys' fees, encourages an award for compensation, which is improper.

Although Apache voiced its complaint against the submission of the exemplary damage issue, the objection was that it encouraged damages to be awarded as compensation, not, as presented on appeal, that the trial court failed to list certain factors to guide the jury in its determination.[10] Failing to point out to the trial court distinctly the objection raised on appeal, Apache has waived any error. *Castleberry* v. *Branscum*, 721 S.W.2d 270, 276 (Tex. 1986). Apache had the responsibility of making the trial court aware of its

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[10] Apache's appellate contention is that the factors outlined in *Alamo Nat. Bank* v. *Kraus*, 616 S.W.2d 908, 910 (Tex. 1981), should have been included in the submission. Those factors are for appellate consideration in determining whether the amount of exemplary damages was reasonable, 863 S.W.2d 210, 218 (Tex. App.—Houston [14th Dist.] 1993, no writ); *K-Mart Corp* v. *Pearson on Behalf of Ramos*, 818 S.W.2d 410, 416 (Tex. App.—Houston [1st Dist.] 1991, no writ), and *may* be included in jury submissions. *State Farm Mut. Auto. Ins. Co.* v. *Zubiate*, 808 S.W.2d 590, 603 (Tex. App.—El Paso 1991, writ denied). Prior to *Transportation*, which we have determined to be proactive only, there was no authority for Apache's position that those factors *must* be included in the submission of the issue to the jury. *Cf.* 879 S.W.2d at 29 n.26 (footnote states that Texas jurors are instructed on the factors in *Kraus*, intimating it is the practice of trial courts to so instruct, though this is not necessarily so).

complaint timely and plainly. *State Dept. of Highways* v. *Payne*, 838 S.W.2d 235, 241 (Tex. 1992). Failing to do so, Apache has not preserved its complaint for our review. Tex. R. App. P. 52(a).

Apache's next constitutional challenge to the award is that it bears no reasonable relationship to the amount of actual damages or the severity of the offense. While an award of exemplary damages must bear an understandable and reasonable relationship to the actual damage award and the nature of the defendant's conduct, *Alamo Nat. Bank* v. *Kraus*, 616 S.W.2d 908, 910 (Tex. 1981), the reasonable proportion rule does not, standing alone, serve to fix a particular ratio. *Tatum* v. *Preston Carter Co.*, 702 S.W.2d 186, 188 (Tex. 1986). Each particular case must be reviewed on its own facts.

The amount of exemplary damages to be awarded is uniquely within the jury's discretion, *Goswami* v. *Thetford*, 829 S.W.2d 317, 321 (Tex. App.—El Paso 1992, writ denied), and the process has no express standards. *State Farm Mut. Auto. Ins. Co.* v. *Zubiate*, 808 S.W.2d 590, 606 (Tex. App.—El Paso 1991, writ denied) (Osborn, C.J., concurring). Unless the size of the award and the circumstances of the case indicate the award was the result of passion or prejudice, or that the evidence has been disregarded by the jury, the verdict is conclusive and should not be set aside either by the trial or appellate court. *Donnel* v. *Lara*, 703 S.W.2d 257, 262 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.).

It is evident there is no bright line mathematical formula upon which to calculate ratios between actual and exemplary damages. *Pacific Mutual Life Insurance Company* v. *Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991). In conducting our review to determine the reasonableness of the award, we must bear in mind the guiding factors set forth in *Kraus*, which include: (1) the nature of the wrong; (2) the character of the conduct involved; (3) the degree of

culpability of the wrongdoer; (4) the situation and sensibilities of the parties concerned; and (5) the extent to which such conduct offends a public sense of justice and propriety. 616 S.W.2d at 910.

The nature and character of the wrong were shown by Apache's lack of diligence in preventing, or attempting to prevent, a known kickback scheme, thereby allowing inspections to be invoiced when there was no certainty they were performed, and allowing the pervasive use of kickbacks in the forms of drugs, alcohol and prostitutes to affect operations on the Key 1-11 well. Apache argues that the nature of the wrong was the Moore group's economic loss, and exemplary damages in large ratios to pure economic losses are improper. This argument is negated by the United States Supreme Court's upholding of an award of exemplary damages awarded on purely economical actual damages at a ratio of 526 to 1. *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. ___, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993). Moreover, an act or omission that creates great peril but results only in minor injury may be grossly negligent, *Transportation Insurance Company* v. *Moriel*, 879 S.W.2d at 21-22, and the blowout presented the possibility of great danger and the loss of human life had someone been present on the well at the time of the blowout.

The vice-principals of Apache, including Clower, Snapp, Tate and Storts knew kickbacks were prevalent, and there was evidence that each of these men participated to some degree in the kickback scheme, making Apache culpable for the activities on the Key 1-11 well. *Rainbow Exp., Inc.* v. *Unkenholz*, 780 S.W.2d at 432. Additionally, Apache failed to monitor the well after shutting it in with pressure on the backside. There was ample evidence that Apache was aware the well was under-manned, that "Apache had too many well operations and not enough people—people that weren't taking care of their job," and that the operation of the Key 1-11 well was "poorly supervised in the field." Finally, the deportment

of Apache's company men on the Key 1-11 well, as shown by the evidence, could have been viewed by the jury as offensive to the public's sense of propriety.

In applying the factors set forth in Kraus to the facts and circumstances of this case, we have viewed the evidence in the light most favorable to the jury's verdict. *Chemical Express* v. *Cole*, 342 S.W.2d 773, 780 (Tex. Civ. App.—Dallas 1961, writ ref'd n.r.e.). In light of this application, the jury's award was not a baseless award.

In consideration of Apache's contention that its calculated ratios of exemplary to actual damages, 208 to 1 each for Leo Moore and Daisy Moore, and 104 to 1 for Bess Cole, are disproportionate, we have reviewed precedential cases discussing acceptable ratios. Our research has revealed that Texas courts have approved ratios of exemplary to actual damages ranging from 3 to 1, *Bank of North America* v. *Bell*, 493 S.W.2d 633, 636 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ); 19 to 1, *Goswami* v. *Thetford*, 829 S.W.2d at 321; 28 to 1, Beacon Nat. Ins. Co. v. Reynolds, 799 S.W.2d 390, 398 (Tex. App.—Fort Worth 1990, writ denied); to 2,250 to 1, *Donnel* v. *Lara*, 703 S.W.2d at 261-62. These holdings and others of like ilk, coupled with the United States Supreme Court's holding in *TXO Production Corp.* v. *Alliance Resources Corp.*, approving a ratio of exemplary to actual damages of 526 to 1, support our determination that the awards of exemplary damages which relate to actual damages at ratios of 208 to 1 and 104 to 1 are not unreasonable.[11]

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[11] It has been suggested that the required ratio of exemplary to actual damages is unnecessary. James T. Foley, *Required Ratio of Actual to Exemplary Damage*, 25 Baylor L. Rev. 127, 134 (1973). In light of the application the courts have made of the requirement, it would appear that the courts, at least in application, agree. Even the United States Supreme Court has declined to employ an approach that focuses entirely on the relationship between actual

Our Texas Legislature, in an attempt to regulate exemplary to actual damages ratios, enacted a statute to limit the amount of exemplary damages to four times the amount of actual damages or $200,000, whichever is greater. Tex. Civ. Prac. & Rem. Code Ann. § 41.007 (Vernon Supp. 1994). However, the applicability of the statute is limited to causes of action defined by section 33.001 of the Texas Civil Practice & Remedies Code, entitled "Comparative Responsibility." Tex. Civ. Prac. & Rem. Code Ann. § 41.002(a) (Vernon Supp. 1994). Because the present action does not fall within the scheme of the statute, the statute does not supersede the Moore group's recovery. *Transfer Products, Inc.* v. *Texpar Energy, Inc.*, 788 S.W.2d 713, 717 (Tex. App.—Corpus Christi 1990, no writ).

Apache next contends that the award of exemplary damages amounts to an excessive fine, violative of the Excessive Fines Clause of the Texas Constitution article I, § 13. The contention is premised upon the interpretation in *Pennington* v. *Singleton*, 606 S.W.2d 682 (Tex. 1980), that the clause includes civil penalties. *Id.* at 690; and see *State Farm Mut. Auto. Ins. Co.* v. *Zubiate*, 808 S.W.2d at 604-05.

Since the interpretation of the clause in *Pennington*, the United States Supreme Court has interpreted the federal counterpart of our article I, § 13, *supra*, to be inapplicable to exemplary damage awards between private parties. *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989). We agree with the reasoning of the Court in *Browning-Ferris*, and believe that the excessive fines clause

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and exemplary damages. *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. ___, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993). Because the exact ratio is not necessary to our determination regarding excessiveness, we do not address the correct method of calculating ratios as presented by the Moore group.

of the Texas Constitution is not applicable to the present award of exemplary damages since there is no state action involved. *Celotex Corp.* v. *Tate*, 797 S.W.2d 197, 208 (Tex. App.—Corpus Christi 1990, no writ).

Nevertheless, we have reviewed the potential excessiveness of the award in light of the clause, bearing in mind the primary consideration whether the fine was fixed with reference to the objective it was to accomplish, *Pennington* v. *Singleton*, 606 S.W.2d at 690, and focusing on Apache's conduct. *Corporate Wings, Inc.* v. *King*, 767 S.W.2d 485, 489 (Tex. App.—Dallas 1989, no writ). The object here to be accomplished was to deter Apache and others similarly situated from the same kind of conduct made the basis of this suit, to punish Apache for its gross negligence, *State Farm Mut. Auto. Ins. Co.* v. *Zubiate*, 808 S.W.2d at 605, and to deter Apache from encouraging or failing to discourage employee behavior. *Borden Inc.* v. *Rios*, 850 S.W.2d 821, 829 (Tex. App.—Corpus Christi 1993, no writ). These objectives are evidenced by the conditional submission of the charge on these issues in the present instance.

The constitution requires that exemplary damages not be grossly excessive, but it does not require such an award to be ineffectual and impotent. *Eichenseer* v. *Reserve Life Ins. Co.*, 934 F.2d 1377, 1383 (5th Cir. 1991). Consequently, the net worth of the defendant is relevant in examining the excessiveness of such an award. *Lunsford* v. *Morris*, 746 S.W.2d 471 (Tex. 1988).

The parties stipulated Apache's net worth was an estimated $439,000,000; thus, the $4,500,000 exemplary damage award constituted approximately 1% of Apache's net worth. We have determined that such an award was not excessive considering the attending circumstances previously outlined. The penalty imposed bore a direct relationship to the purposes of the imposition of the fine and was not excessive. Apache's third point of error is overruled.

Depicted in six sub-points, Apache contends by its fourth point of error that even if exemplary damages are justified, the trial court erred in failing to remit the excessive amount awarded. We have previously determined the award was not excessive, pretermitting our address of this issue. Even so, remittitur is only appropriate when the evidence is insufficient to support the verdict. *Pope* v. *Moore*, 711 S.W.2d 622, 624 (Tex. 1986). If the evidence is factually sufficient to support a jury award of any amount, the court has no authority to suggest a remittitur, no matter how manifestly unjust or shocking to the conscience of the court the amount of the award may be. *City of La Porte* v. *Prince*, 851 S.W.2d 876, 883 (Tex. App.—Waco 1993, writ granted).

Because the amount of exemplary damages is uniquely within the jury's discretion, *Goswami* v. *Thetford*, 829 S.W.2d at 321, there is, by necessity, little evidence of a dollar amount upon which the jury can rely. When a jury honestly tries to set an amount to punish a wrongdoer that does not oppress him, but which is great enough to keep him and others similarly situated from committing similar acts, the judgment should not be disturbed by the appellate courts. *Aetna Cas. and Sur. Co.* v. *Joseph*, 769 S.W.2d 603, 608 (Tex. App.—Dallas 1989, no writ).

In determining factual insufficiency, we consider and weigh all of the evidence, including any evidence contrary to the trial court's judgment. *Pool* v. *Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986). In so doing, it is not within our province to second guess the jury unless only one inference could be drawn from the evidence. *State* v. $11,014.00, 820 S.W.2d 783, 785 (Tex. 1991).

The evidence previously outlined is legally sufficient for the jury to have found exemplary damages. Moreover, we have determined that this evidence was sufficient to support the award and the award was not excessive or unreasonable under the circumstances. Based upon our prior

determinations, we overrule Apache's fourth point of error in its entirety.

By the sixth point of error, Apache contends the separate submission of exemplary damages attributable to attorney's fees was reversible error. If so, the harm can be corrected by modification of the judgment in regard to Apache's contention that the Moore group was not entitled to attorney's fees. Tex. R. App. P. 90.

The jury awarded $4,000,000 as exemplary damages excluding attorney's fees, and $500,000 as exemplary damages attributable to attorney's fees, all to be divided equally among the eight plaintiff-intervenors remaining at trial. By its judgment, the trial court awarded the Moore group $1,687,500 in exemplary damages, which award included their individual portions of 12.5% of the $500,000 attributable to attorney's fees.

Although it is established that compensation for attorney's fees may be recovered as part of exemplary damages, *Hofer* v. *Lavender*, 679 S.W.2d 470, 474 (Tex. 1984); *Planet Plows, Inc.* v. *Evans*, 600 S.W.2d 874, 877 (Tex. Civ. App.—Amarillo 1980, no writ), it is unnecessary for us to decide whether, in this cause, it was appropriate to separate that element in the submission of the issue to the jury. This is so, because in this cause, Daisy Moore acted pro se and, although Leo Moore and Bess Cole were represented by an attorney, there was no evidence of the amount of attorney's fees, if any, paid by them to serve as the basis for their compensation.

Raymond Doak Bishop, an attorney for a law firm representing the Scott group in the past, testified to the amount of attorney's fees expended by the Scott group, but neither he, nor anyone else, testified to any attorney's fees incurred by Leo Moore and Bess Cole. Because there was no evidence of any attorney's fees paid or incurred by Leo Moore and Bess Cole, we modify the judgment to delete the

award for attorney's fees from their recovery of exemplary damages.

Daisy Moore acted pro se throughout the proceedings and, as a consequence, incurred no attorney's fees. She is not entitled to compensation for time lost due to litigation, *Shenandoah Assoc.* v. *J & K Properties*, 741 S.W.2d 470, 487 (Tex. App.—Dallas 1987, writ denied), and she is not entitled to recovery of attorney's fees for acting on her own behalf. See *Beasley* v. *Peters*, 870 S.W.2d 191 (Tex. App.—Amarillo 1994, n.w.h.). We modify the judgment to delete the award for attorney's fees from her recovery of exemplary damages. To this extent, Apache's sixth point of error is sustained; otherwise it is overruled.

By its final point of error, Apache contends the trial court erred in allowing an expert, designated only by Leo Moore and Bess Cole, to testify on behalf of Daisy Moore. In support of this contention, Apache directs our attention to "Daisy Moore's Answers to Interrogatories," found in the transcript.

We have reviewed Daisy Moore's responses, in which she identifies and responds to interrogatory numbers 5, 7, 14, 15, and 18, none of which ask for a designation of experts. A complete set of the interrogatories sent to Mrs. Moore is not found in the record, and there is nothing in the record to indicate the omitted interrogatories made inquiry regarding expert witnesses.

It is appellant's burden to present a record sufficient to show the error contended to require reversal. Tex. R. App. P. 50(d); *Pyles* v. *United Services Auto. Ass'n*, 804 S.W.2d 163, 164 (Tex. App.—Houston [14th Dist.] 1991, writ denied). Because Apache failed to present a record showing the error complained of, its contention has not been preserved for our review. *Rossen* v. *Rossen*, 792 S.W.2d 277, 278 (Tex. App.—Houston [1st Dist.] 1990, no writ). Apache's seventh point of error is overruled.

Accordingly, the judgment of the trial court is modified to delete the recovery by the Moore group, and each member thereof, the portion of attorney's fees awarded them by the jury and, as modified, is affirmed.

ON MOTION FOR REHEARING

By its motion for rehearing, Apache alleges that our original opinion contained numerous factual inaccuracies and mischaracterizations of the evidence. While we remain convinced that our original disposition of Apache's appeal is correct, we concede, in regard to its factual inaccuracy claim, that our recording, in paragraph eleven of the opinion, of events in June and the following February, showed, by typographical mischance, the year 1992 for the June events and the year 1993 for the February events, whereas the correct years were 1982 and 1983, respectively. We, therefore, readily amend the eleventh paragraph to reflect that the June events were in 1982 and the February events were in 1983.

Upon analysis, Apache's evidentiary complaints are centered on what it characterizes in its motion as this Court's findings made from the evidence. It suffices to state that the perceived findings are merely recitations of the facts culled from a voluminous evidential record, marshalled in response to Apache's complaints of insufficient evidence, and determined to be sufficient bases for the jury's findings of fact. Consequently, the varying interpretations of the evidence need not be again addressed; but, in this connection, we observe that Apache's associated complaints that we erred in our application of the law to the facts are virtually the same complaints made on original submission, and we deem they were given full attention in our original opinion.

Parenthetically, we note that since the writing of our original opinion, it has come to our attention that the judgments rendered in *Heil-Quaker Corp.* v. *Mischer Corp.*,

863 S.W.2d 210 (Tex. App.—Houston [14th Dist.] 1993), cited, with a "no writ" history, in marginal note 10 of our opinion, and in *Borden Inc.* v. *Rios*, 850 S.W.2d 821 (Tex. App.—Corpus Christi 1993), cited, with a "no writ" history, late in our opinion during the address of Apache's third-point challenge to the constitutionality of the exemplary damage award, have been set aside pursuant to settlement agreements. Because the judgments were set aside "without reference to the merits," *Mischer Corp.* v. *Heil-Quaker Corp.*, 877 S.W.2d 300, (Tex. 1994); *Borden, Inc.* v. *Rios*, 859 S.W.2d 70 (Tex. 1993), their stature as stare decisis is equivalent to a writ dismissed case, and their opinions remain valid support for the propositions for which they were cited in the original opinion. *Houston Cable* v. *Inwood West Civic Ass'n*, 860 S.W.2d 72, 73 (Tex. 1993).

Aside from these corrections, Apache's motion for rehearing is overruled.

APPENDIX B

NO. 37,135-B

TOM L. SCOTT, INC., ET AL.	§	IN THE DISTRICT
	§	
	§	COURT OF RANDALL
VS.	§	
	§	COUNTY, TEXAS
	§	
APACHE CORPORATION and MERIDIAN OIL PRODUCTION, INC.	§	181ST JUDICIAL
	§	DISTRICT
	§	
	§	

JUDGMENT

BE IT REMEMBERED that on the 13th day of July, 1992, the above-styled and numbered cause was called for trial, and came Plaintiffs TOM L. SCOTT, INC., GEORGE S. JOHNSON, SUNSHINE EXPLORATION COMPANY, W. W. BRADEN, III, CANYON ENERGY, INC., LEO MOORE and BESS COLE, by and through their attorneys, and came Plaintiff DAISY MOORE as attorney *pro se*, and came Defendants APACHE CORPORATION and MERIDIAN OIL PRODUCTION, INC., by and through their attorneys, and all parties announced ready for trial.

A jury having previously been demanded, a jury of twelve (12) good and lawful jurors and (2) good and lawful alternate jurors was then duly selected, impaneled and sworn, and the case proceeded to trial. At the conclusion of the evidence and summations, the two (2) alternate jurors were executed, and the case was submitted to the jury on August 25, 1992. Thereafter, on August 28, 1992, the jury returned

its unanimous verdict in open court in favor of Plaintiffs and against Defendant APACHE CORPORATION, as follows:

QUESTION 1

Did the negligence, if any, of Apache proximately cause the occurrence in question?

Answer "Yes" or "No".

ANSWER: Yes

If your answer to Question 1 is yes, then answer Question 2. Otherwise, do not answer Question 2.

QUESTION 2

Was such negligence of Apache "gross negligence"?

"Gross negligence" means such want of care, if any, as to indicate that the act or omission in question was the result of conscious indifference to the rights, welfare, or safety of the persons affected by it.

You are further instructed that in order for Apache to have been grossly negligent, you must find that:

a. Apache authorized or approved the doing and manner of the action, or authorized or approved the inaction; or

b. The employee engaging in the conduct was unfit and Apache was reckless in employing him; or

c. The employee engaging in the conduct was employed in a managerial capacity and was acting in the scope of employment; or

d. Apache or a manager of Apache ratified or approved the action or inaction.

Answer "Yes" or "No".

ANSWER: Yes

If your answer to Question 1 is yes, then answer Question 3. Otherwise, do not answer Question 3.

QUESTION 3

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate the Plaintiffs for their loss, if any, resulting from the occurrence in question?

Consider the following element of damages, if any, and no other:

The value, if any, of the natural gas and condensate attributable to the royalty interest of each Plaintiff that flowed from the Key 1-11 well bore, if any.

Do not include interest in any amount of damages you find.

Answer in dollars and cents for damages, if any, that were sustained in the past or, in reasonable probability, will be sustained in the future.

ANSWER:

Tom L. Scott, Inc.	Past	0
	Future	$ 26,631
George S. Johnson	Past	0
	Future	$ 22,023
Sunshine Exploration Company	Past	0
	Future	$ 3,842
W. W. Braden III	Past	0
	Future	$ 769
Canyon Energy, Inc.	Past	0
	Future	$ 17,182

Daisy Moore	Past	0
	Future	$ 2,705
Leo Moore	Past	0
	Future	$ 2,705
Bess Cole	Past	0
	Future	$ 5,425

QUESTION 4

Did Apache convert natural gas and/or condensate owned by Plaintiffs?

To "convert" the property of another means to exercise wrongful dominion and control over, or to destry another's property in denial of or inconsistent with his rights. Intent is not an element. It is not necessary that the property converted be appropriated to the use of the person converting the property.

Answer "Yes" or "No."

ANSWER: Yes

If your answer to Question 4 is yes, then answer Question 5. Otherwise, do not answer Question 5.

QUESTION 5

Was Apache's conversion of Plaintiffs' natural gas and/or condensate committed willfully and knowingly?

"Willful" means knowingly, intentionally, deliberately and designedly.

Answer "Yes" or "No."

ANSWER: No

If your answer to Question 4 is yes, then answer Question 6. Otherwise, do not answer Question 6.

QUESTION 6

What sum of money, if paid now in cash, would fairly and reasonably compensate Plaintiffs for their loss, if any resulting from occurrence in question?

Consider the following element of damages, if any, and no other:

The value, if any, at the time the gas and condensate flowed from the well, of the natural gas and condensate attributable to the royalty interest of each Plaintiff that flowed from the Key 1-11 well bore, if any.

Do not include interest in any amount of damages you find.

Answer in dollars and cents for damages, if any, that were sustained in the past or, in reasonabe probability, will be sustained in the future.

ANSWER:

Tom L. Scott, Inc.	Past	$58,972
	Future	0
George S. Johnson	Past	$50,115
	Future	0
Sunshine Exploration Company	Past	$ 7,388
	Future	0
W. W. Braden III	Past	$ 155
	Future	0
Canyon Energy, Inc.	Past	$36,624
	Future	0
Daisy Moore	Past	$ 9,615
	Future	0
Leo Moore	Past	$ 9,615
	Future	0
Bess Cole	Past	$19,229
	Future	0

If your answer to Question 2 is yes and you found an amount of damages in Question 3, or if your answer to Question 4 is Yes, and you found an amount of damages in Question 6, then answer Question 7. Otherwise, do not answer Question 7.

QUESTION 7

What sum of money, if any, should be assessed against Apache as exemplary damages:

Answer in dollars and cents, if any, for each of the following.

a) Other than as compensation for attorney's fees?

ANSWER: $4,000,000

b) As exemplary damages attributable to reasonable attorney's fees?

ANSWER: $ 500,000

"Exemplary damages" means an amount that you may in your discretion award as an example to others and as a penalty or by way of punishment, in addition to any amount that you may have found as actual damages. Exemplary damages may also include compensation, if any, for reasonable attorney's fees, if any.

If you answered Question 7, then answer Question 8. Otherwise, do not answer Question 8.

QUESTION 8

What percentage of the exemplary damages found by you in your answer to Question 7 should be awarded to each of the following Plaintiffs?

The percentages you find must total 100 percent.

ANSWER:

Tom L. Scott, Inc.	12.5%
George S. Johnson	12.5%
Sunshine Exploration Company	12.5%
W. W. Braden III	12.5%
Canyon Energy, Inc.	12.5%
Daisy Moore	12.5%
Leo Moore	12.5%
Bess Cole	12.5%
TOTAL	100%

Such findings were received by the Court and were filed and entered of record in the Minutes of the Court. The Court, based upon the jury's findings to the questions set forth above and incorporated herein for all purposes, being of the opinion that judgment should be rendered against APACHE CORPORATION in favor of Plaintiffs Leo Moore, Bess Cole, and Daisy Moore, it is accordingly,

ORDERED, ADJUDGED and DECREED that Plaintiffs Leo Moore, Bess Cole and Daisy Moore are awarded Judgment against Defendant APACHE CORPORATION for actual damages in favor of each of said Plaintiffs as found by the jury in answer to Question 3, above, that judgment is also awarded against APACHE CORPORATION for the additional amount of One Million Six Hundred Eighty-Seven Thousand Five Hundred and NO/100 Dollars ($1,687,500.00) in exemplary damages, apportioned equally among Plaintiffs Leo Moore, Bess Cole, and Daisy Moore, as found by the jury in answer to Question 8 above, and that Judgment is further awarded against Apache Corporation for costs of Court, for all of which let execution issue if not timely paid.

It is also ORDERED, ADJUDGED AND DECREED that Plaintiffs shall take nothing against Defendant MERIDIAN OIL PRODUCTION, INC.

It is further ORDERED, ADJUDGED and DECREED that all relief not expressly granted herein is denied.

SIGNED this 4th day of December, 1992.

/s/
BILL SHEEHAN
Presiding Judge

APPENDIX C

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

October 27, 1995

Mr. Jess H. Hall, Jr.
Liddell Sapp Zivley Hill & LaBoon
3300 Texas Commerce Tower
Houston, TX 77002

Mr. Jeff Weems
Liddell Sapp Zivley Hill & LaBoon
3300 Texas Commerce Tower
Houston, TX 77002

Mr. Richard N. Countiss
Law Office of Richard N. Countiss-
1301 McKinney, Suite 3500
Houston, TX 77010-3092

Mr. Jack O'Neill
Clements O'Neill Pierce & Nickens
1000 Louisiana, Suite 1800
Houston, TX 77002-5009

Mr. James E. Essig
Liddell Sapp Zivley Hill & LaBoon
3300 Texas Commerce Tower
Houston, TX 77002

Ms. D'Anne Haydel
Clements O'Neil & Pierce
1000 Louisiana Street
Suite 1800
Houston, TX 77002

Mr. Kelly J. Kirkland
Clements O'Neill Pierce & Nickens
First Interstate Bank Plaza
1000 Louisiana
Suite 1800
Houston, TX 77002

RE: Case Number 94-1234

Style: APACHE CORPORATION

v.

LEO MOORE, DAISY MOORE, and BESS COLE

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation "Writ Denied". Motion to forward exhibits is overruled.

Sincerely,

John T. Adams, Clerk

by /s/
Blanca E. Morin, Deputy

cc: Ms. Daisy Moore

APPENDIX D

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

December 7, 1995

Mr. Jess H. Hall, Jr.
Liddell Sapp Zivley Hill & LaBoon
3300 Texas Commerce Tower
Houston, TX 77002

Mr. Jeff Weems
Liddell Sapp Zivley Hill & LaBoon
3300 Texas Commerce Tower
Houston, TX 77002

Mr. Richard N. Countiss
Law Office of Richard N. Countiss
1301 McKinney
Suite 3500
Houston, TX 77010-3092

Mr. Jack O'Neill
Clements O'Neill Pierce & Nickens
1000 Louisiana, Suite 1800
Houston, TX 77002-5009

Mr. James E. Essig
Liddell Sapp Zivley Hill & LaBoon
3300 Texas Commerce Tower
Houston, TX 77002

Ms. D'Anne Haydel
Clements O'Neill & Pierce
1000 Louisiana Street
Suite 1800
Houston, TX 77002

Mr. Kelly J. Kirkland
Clements O'Neill Pierce & Nickens
First Interstate Bank Plaza
1000 Louisiana, Suite 1800
Houston, TX 77002

RE: Case Number 94-1234
Style: APACHE CORPORATION
v.
LEO MOORE, DAISY MOORE, and BESS COLE

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

JOHN T. ADAMS, CLERK

/s/

BY: _____
Michael C. Murphey, Deputy Clerk

cc: Ms. Daisy Moore

(2)

Supreme Court, U.S.
FILED
APR 1 1996
CLERK

No. 95-1414

In The

Supreme Court of the United States

October Term, 1995

APACHE CORPORATION,

Petitioner,

v.

LEO MOORE, DAISY MOORE, AND BESS COLE,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Texas

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JACK O'NEILL*
KELLY J. KIRKLAND
CLEMENTS, O'NEILL, PIERCE & NICKENS, L.L.P.
1000 Louisiana, Suite 1800
Houston, Texas 77002-5009
(713) 654-7600

*Counsel of Record

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

45 pp

QUESTION PRESENTED

Whether the imposition of $1,500,000 in punitive damages against a company whose gross negligence caused what is believed to be the largest gas well blowout in United States history violates the Due Process Clause of the Fourteenth Amendment.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

FOREWORD

Respondents will refer to the Petitioner, Apache Corporation, as "Apache", and will refer to the Respondents, Leo Moore, Daisy Moore, and Bess Cole, in the plural, as simply the "Moore Group." The members of the Moore Group were intervenor-plaintiffs in the trial court, and Apache was a defendant.

References to the statement of facts of the trial court proceedings will use the notation "S.F. ___."[1] References to the trial court transcript will use the notation "Tr. ___." Because the Moore Group were plaintiffs in the trial court, references to the Moore Group's trial exhibits will use the notation "P. Ex. ___." Finally, references to Apache's Petition For a Writ of Certiorari ("Petition") will use the notation "Pet. ___", and references to the Appendix to such Petition will use the notation "Pet. App. ___."

Daisy Moore represented herself at trial. Her husband, Leo Moore, and her sister-in-law, Bess Cole, were represented at trial by the undersigned counsel for the Moore Group. This Brief in Opposition to Apache's Petition is filed on behalf of all three members of the Moore Group.

---

[1] In Texas, the record of the oral proceedings (witness testimony, oral motions and argument, etc.) before the trial court is referred to as the "Statement of Facts". Selected written documents (pleadings, written motions, jury charge, verdict, judgment, etc.) involved in the trial comprise the "Transcript".

OPINIONS BELOW, JURISDICTION, CONSTITUTIONAL PROVISION INVOLVED

The Moore Group adopts the sections of Apache's Petition entitled "Opinions Below",[2] "Jurisdiction", and "Constitutional Provision Involved". However, virtually every paragraph of the section of Apache's Petition entitled "Statement" contains inaccuracies and material omissions that make the Statement more of a jury argument than an accurate summary of the evidence. The Moore Group therefore presents its own "Statement of the Case."

STATEMENT OF THE CASE

The Key 1-11 well, located in Wheeler County, in north Texas, blew out on October 4, 1981. S.F. 2765. Apache was the operator of the well and was also a working interest owner in the well. The Moore Group were royalty interest owners on tracts adjoining section 11, where the well was located. The Moore Group's claim was that Apache's negligence and gross negligence in the drilling, completion and monitoring of the well caused the well to blow out, resulting in drainage of gas from the tracts in which the Moore Group owned interests.[3] Tr. 13.

---

[2] The Moore Group would point out, however, that there should be a line break immediately before the name "Paul Douglas Storts" on page 10a of Appendix A to Apache's Petition.

[3] At trial, there were eight plaintiffs: Tom L. Scott, Inc., George S. Johnson, Sunshine Exploration Company, W. W. Braden, III, and Canyon Energy, Inc. (collectively, the "Scott Group"), as well as the three members of the Moore Group. All

After a trial lasting over a month and a half, including three days of jury deliberations, the jury returned a verdict finding Apache liable for conversion and gross negligence. The jury awarded the eight plaintiffs $191,713 in actual damages for conversion, $81,282 in actual damages for gross negligence, and $4,500,000 in punitive damages (an amount later reduced as discussed below). Pet. App. 38a-43a.

Apache settled with the Scott Group after verdict but before entry of judgment. Following that settlement, the trial court entered judgment for the Moore Group, based on the jury verdict, for $10,835 in actual damages for gross negligence and $1,687,500 in punitive damages. Pet. App. 37a-44a. On appeal, the Texas Court of Appeals reduced the punitive damages awarded to the Moore Group to $1,500,000 (Pet. App. 33a-34a) but otherwise affirmed the trial court's judgment. Pet. App. 35a. The Texas Supreme Court denied Apache's Application for a Writ of Error. Pet. App. 45a-48a.

According to Apache, an unreasonable jury "fined" Apache (Pet. 12) $4,500,000 in exemplary damages based upon "days and days of highly inflammatory testimony" concerning gifts from contractors to Apache employees of money, cars, alcohol, drugs and prostitutes. Pet. 6-7. Apache claims that in awarding exemplary damages, the jury sought to punish Apache, even though "[t]here was not a stitch of evidence that Apache management authorized the employees to perform their jobs improperly", there is "no support for the proposition that, prior to the

---

plaintiffs except Daisy Moore were represented at trial by counsel for Respondents here. Ms. Moore represented herself *pro se*.

blowout, Apache management had 'actual knowledge' of the existence of the kickback practices", and "there can be no question that management neither participated in that scheme nor approved it once it learned of it." Pet. 8, 15. According to Apache, there was "no evidence whatever" that the conduct of any of its employees connected with the well "was impacted by his having accepted kickbacks", and any evidence of kickbacks "had only the most attenuated and speculative connection to the blowout." Pet. 7. In Apache's view, the well was in fact drilled, completed and managed in accordance with industry custom. Pet. 2, 4, 12. The jury simply ignored all of the evidence that Apache acted properly, choosing instead to focus on conduct that amounted at most to "an isolated instance of inattentiveness and/or bad judgment by low-level employees." Pet. 3-4, 12-15. In short, Apache contends that this is a "classic case of punishing the victim" rather than the perpetrator. Pet. 1.

These themes, which are interwoven throughout Apache's Petition, ignore and are inconsistent with the evidence. As will be seen below, the jury's verdict was fully supported by the evidence, and the opinion of the Texas Court of Appeals is correct.

The Key 1-11 well was a deep, high pressure gas well that extended more than sixteen thousand feet (three miles) underground. S.F. 1345-1346. When the well blew out, the force of the blowout launched the wellhead and tubulars eighty feet into the air. S.F. 1586. The well blew out for 16 months. From October 4, 1981, until June, 1982, the gas escaping from the well bore was vented into the atmosphere. From June, 1982, until the blowout was extinguished, Apache managed to capture the escaping gas into a pipeline and sell it. S.F. 2177. Apache was

finally able to "kill" the well and extinguish the blowout in February, 1983. S.F. 2582.

In terms of gas lost, the blowout may be the largest blowout of a gas well in United States history. Pet. App. 4a. From October 4, 1981, until the blowout was killed in February, 1983, 14.3 billion cubic feet of gas were drained from the reservoir, much of which came from portions of the reservoir other than section 11, the section in which the Key 1-11 well was located. S.F. 2052. The total value of the gas vented into the atmosphere from October, 1981 to June, 1982, was approximately $69,000,000. S.F. 3915. In addition, Apache was paid high prices, totaling approximately $41,000,000, for the gas that Apache was able to capture and sell from June, 1982, until February, 1983. S.F. 2177.

Following the blowout, numerous royalty owners from section 11 (on which the well was located) and mineral interest owners from surrounding tracts connected to the common underground natural gas reservoir filed claims against Apache and its co-working interest owner, El Paso Exploration Company ("El Paso"), now known as Meridian Oil Production, Inc. Apache and El Paso in turn filed claims against various suppliers and contractors on the well, including Axelson, Inc. ("Axelson"), the supplier of a casing relief valve installed on the well by Apache after Apache realized that the well had problems. Tr. 415; S.F. 1575. By the time the case was called to trial, the only remaining parties were the eight plaintiffs mentioned above, who were royalty owners on adjoining tracts, and Apache, El Paso, and Axelson. Apache and El Paso settled with Axelson at the completion of *voir dire* examination of the jury panel. S.F. 7-8.

The case then proceeded to trial with the eight plaintiffs asserting their claims against Apache.

The evidence in this case is voluminous. In order to understand it and its relevance to the "Reasons for Granting the Petition" set forth by Apache in its Petition, it is necessary to understand the way in which the well was constructed. First, 20 inch (in diameter) conductor pipe was inserted into the ground, from the surface to a depth of approximately 100 feet. S.F. 1417. Next, $10^{3}/_{4}$ inch surface casing was inserted ("run") inside the conductor pipe to a depth of 5,200 feet. S.F. 1368. A string of $7^{5}/_{8}$-inch "intermediate" casing was then run inside the conductor pipe and surface casing, from the surface to a depth of 15,850 feet. S.F. 1404. A string of five inch pipe called a "liner" was then hung, with the top of it attached to the lower part of the intermediate casing, from a depth of 15,514 to 16,288 feet. S.F. 1404. Finally, to bring the gas to the surface, a string of $2^{7}/_{8}$-inch production tubing ran from the surface down to within a few feet of the bottom of the well. S.F. 1418. The space between the $2^{7}/_{8}$-inch production tubing and the $7^{5}/_{8}$-inch intermediate casing is called the "tubing-casing annulus" (the "annulus"). S.F. 1413. "Pressure on the backside" refers to unexpected pressure inside the annulus, on the "backside", (*i.e.*, outside) of the $2^{7}/_{8}$-inch production tubing, exerting force outward against the intermediate casing. Both sides' liability experts agreed that the event that precipitated the blowout was the rupture of the $7^{5}/_{8}$-inch intermediate casing (S.F. 1586; 2621-2622), and that the intermediate casing ruptured due to excessive pressure on the backside. S.F. 1586; 2623.

As operator of the well, it was Apache's responsibility to drill and complete the well. Ratliff Drilling

Company ("Ratliff"), which was hired by Apache to help drill the well, was to take instructions from Apache in every phase of the well's construction. S.F. 655. Ralph Walker, Apache's drilling superintendent, took charge of the well and issued instructions to Ratliff on a "need-to-know" basis. S.F. 663. Mr. Walker often ran the drilling rig (S.F. 676) and loaded all strings of casing in the well. S.F. 680. He also selected the vendors who supplied goods and services to the well. S.F. 678. Mr. Al Perlin, Apache's general counsel at the time of the blowout, testified that with respect to the safe and proper drilling and completion of the well, the buck stopped with Apache. S.F. 1208.

Even before drilling operations on the well began, Apache took shortcuts and made decisions that adversely affected the well. For example, Apache failed to do a comprehensive well plan for the well. S.F. 1454. Apache then placed Mr. Gordon Clower on the well as Apache's drilling foreman, or "company man." S.F. 2452-2453. It was Mr. Clower's responsibility to supervise Ratliff and make sure that the well was properly drilled. S.F. 199-200. However, because he had a serious drinking problem, Mr. Clower was passed out and incoherent on the well while he was in charge of it. S.F. 25-26; 142-144. Mr. Clower's alcoholism was well known to Apache's regional office that was in charge of the well. S.F. 25-26.

Once drilling operations began, Apache's actions and failures to act continually led to problems with the well. By way of example, as the drill string was being brought out of the hole after cementing the five-inch liner in place at the bottom of the well, Apache failed to see to it that the void left in the hole by the removal of the drill string was filled with drilling mud. This caused the well to "kick", *i.e.*, to begin to flow. S.F. 1485-1489; 1492-1493.

When the kick occurred, Gordon Clower, whom Apache had put in charge of supervising the well, was "missing" from the well site. S.F. 1493. During the kick, thousands of feet of cement were sucked up into the intermediate casing, where the cement hardened. S.F. 2206-2209. This cement then had to be drilled out of the intermediate casing, which cut into the casing and weakened its walls.[4] S.F. 1495-1496; 3992. Despite the damage to the intermediate casing from drilling thousands of feet of cement out of it, Apache ran no logs or tests of any kind to determine the extent of damage to the casing caused by either the kick or by the subsequent drilling out of cement. S.F. 1496-1497; 2212-2214.

After the well was drilled, it was perforated.[5] Almost immediately after perforation, Apache became aware of a pressure leak at the surface. S.F. 1532-1533. Apache realized that this leak meant that there was subsurface pressure on the backside, placing the intermediate casing under stress. S.F. 1528. Mr. Ralph Walker, Apache's drilling superintendent, knew that the source and significance of the leak could not be discovered unless the tubulars were pulled so the leak could be identified and repaired. S.F. 749; 2303. Mr. Walker informed his supervisor, Mr. Loyd Somers, of the buildup of pressure on the backside (S.F. 2218), and recommended that Apache pull the tubing and repair the leak. S.F. 2301-02. Mr. Somers

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[4] This was the casing that all experts agreed eventually failed, causing the blowout. S.F. 1586; 2621-2622.

[5] "Perforation" of a gas well refers to making holes in the casing and cement (if present) to allow natural gas to enter the well. It is usually done by means of a special type of gun lowered into the hole.

was operations manager and chief engineer for Apache in its Tulsa, Oklahoma regional office. S.F. 1584; 2735. However, rather than diagnose and repair the leak, Apache made the decision to complete the well with pressure on the backside. S.F. 1589-1590; 1592; 2239-2241. Incredibly, Apache even perforated the well a second time, thereby *increasing* the pressure against the weakened intermediate casing. S.F. 1521; 1525-1526.

After completing the well, Apache shut in the well in July, 1981, to await connection to a pipeline, and installed an Axelson pressure relief system at the surface of the well near the wellhead. S.F. 2234; 2242. The Axelson system was Apache's substitute for pulling the tubulars, diagnosing and repairing the subsurface pressure buildup. S.F. 1533-1534. The Axelson system was designed to bleed off and relieve the pressure on the backside when the pressure built up to a certain level. S.F. 1534-1535. Apache set the Axelson system to relieve the pressure when it reached 7,000 pounds per square inch ("psi"). S.F. 2237.

The Axelson system required a source of power (pressure) in order to operate. Without power, it was useless. S.F. 1538. Initially, Apache hooked the Axelson system up to pressure supplied by the drilling or completion rig. S.F. 1538. Apache then pressured the Axelson system by tapping into the subsurface pressure on the backside. S.F. 1538; 1542. However, several months before the blowout, Apache changed to bottled nitrogen as a power source for the Axelson system. S.F. 1550. Bottled nitrogen was the power source for the Axelson system at the time of the blowout. S.F. 1552. The nitrogen bottle was

lying on the ground near the wellhead, and was supposed to have been connected to the Axelson system by stainless steel tubing. S.F. 1562; 1790.

After installing the Axelson pressure relief system on the well, Apache delegated the all-important task of monitoring the well and the Axelson system to Mr. Terry Tate, Apache's production foreman. S.F. 392. It was Mr. Tate's job to carry out Apache's responsibility to monitor the well and the Axelson equipment, from July, 1981, until mid-September 1981. S.F. 393. However, Mr. Tate testified that he "had a lot of other things to do." S.F. 393. In fact, he did: "Terry Tate was on the take. Terry Tate was on the drugs. Terry Tate was on the whores. Terry Tate was on anything that he wanted to be on." S.F. 72. Apache's own outside trial counsel wrote to Mr. Al Perlin, general counsel of Apache, that "Terry Tate's malfeasance is particularly harmful, since Terry was in charge of the Key well while it was shut-in and when it blew out." P. Ex. 61-B. In the words of Apache's outside counsel, Apache had "sorry employees" in the field. P. Ex. 61-B.

From mid-September, 1981, until the well blew out on October 4, 1981, Apache assigned its responsibility to monitor the well and the Axelson pressure relief system to Mr. Tom Reames, an Apache "pumper." S.F. 393-394. Apache's theory of the blowout, articulated by its experts, was that the inside of the Axelson system contained aluminum tubing and brass fittings; that aluminum and brass are corrosive and should not have been used by Axelson; that the aluminum tubing inside the Axelson system corroded, resulting in small holes in the aluminum tubing; and that these holes allowed the nitrogen in the nitrogen bottle that was supplying operating power to the Axelson system to bleed dry at least one

week before the blowout, thus eliminating the power source to the Axelson system and rendering it inoperative to relieve the subsurface pressure buildup on the backside. S.F. 2855-2856; 3094; 3155-3156. In the opinion of Apache's experts, during the week or two immediately prior to the blowout, while the Axelson system was thus powerless to operate and relieve pressure, pressure on the backside slowly built up to over 10,000 psi, which caused the 7⅝-inch intermediate casing to rupture. S.F. 2844.

Dr. Ken Sorenson was one of Apache's primary liability experts. Dr. Sorenson acknowledged that the nitrogen bottle that was allegedly bled dry due to the holes in the aluminum tubing inside the Axelson system had a pressure gauge on it. S.F. 3169. Dr. Sorenson further acknowledged that it would have been possible to tell whether the nitrogen bottle had any nitrogen in it to power the Axelson system by simply looking at the pressure gauge on the bottle. S.F. 3169. Thus, if Mr. Reames, who was assigned by Apache to carry out Apache's responsibility to monitor the well during the three weeks preceding the blowout, had simply checked the gauge on the nitrogen bottle, he would have seen that the bottle was empty, and the blowout would have been prevented. Mr. Robert Grace, Apache's lead expert, testified on cross-examination that checking the gauge on the nitrogen bottle was very important. S.F. 2790-91. He was then asked whether he had reviewed the deposition testimony of Mr. Reames concerning whether Mr. Reames ever checked the gauge on the nitrogen bottle prior to the blowout. S.F. 2792. Incredibly, Mr. Grace testified that he did not "specifically recall any testimony in that regard." S.F. 2792. Dr. Sorenson testified essentially the same way.

S.F. 3170-71. However, Mr. Reames' deposition revealed that (i) he had no training by Apache in the use or maintenance of a casing relief valve (S.F. 3248); (ii) he never checked on the Axelson casing relief valve (S.F. 3249); (iii) all he was told by Apache to do was to simply go by the well site to make sure nothing had been stolen and to make sure things looked okay (S.F. 3247, 3249); and (iv) *he never checked the gauge on the nitrogen bottle*. S.F. 3241, 3245.

If it was important to check the gauge on the nitrogen bottle (as confirmed by Apache's own experts), it was doubly important to make sure that the nitrogen bottle was hooked up to the Axelson relief valve. The nitrogen bottle supplied power to the Axelson valve through a piece of stainless steel tubing running from the tip of the nitrogen bottle to the Axelson equipment. S.F. 1543-1544. The Axelson valve was powerless to relieve the pressure buildup on the backside unless it was hooked up. S.F. 1552.

Asked on cross-examination whether the nitrogen bottle was hooked up to the Axelson equipment prior to the blowout, Mr. Grace testified that it was, and further testified that the basis of his opinion was his review of the deposition of Ralph Walker (Apache's superintendent). S.F. 2778. Mr. Grace testified that someone as "trained and experienced" as Mr. Walker would have noticed if the nitrogen bottle had not been hooked up. S.F. 2778. In Mr. Grace's opinion, Mr. Walker could be relied upon. S.F. 2779-80. Dr. Sorenson also testified that the nitrogen bottle was hooked up, similarly relying on Mr. Walker. S.F. 3164. Yet, Mr. Walker, who was called by Respondents by deposition after the completion of

Respondents' cross-examination of Mr. Grace and Dr. Sorenson, testified as follows:

> Q. In your opinion, was the nitrogen bottle on that well hooked up to that stainless steel tubing at the time of that blowout or not?
>
> A. From looking at the end of the steel tubing that was supposed to have been hooked up to the bottle, I can't see any earthly way it could have been hooked up.

S.F. 3994.

Apache knew that the well had pressure on the backside, placing the intermediate casing under stress, almost immediately after Apache perforated the well. Instead of fixing the leak, Apache decided to install a pressure relief system. Apache's own experts testified that the blowout occurred because the pressure relief system failed to relieve the pressure on the backside, which slowly built up to at least 10,000 psi a week or two before the blowout and remained there until the blowout occurred. This pressure exceeded or was close to the burst rating of the 7⅝-inch intermediate casing (S.F. 2844), the critical tubular string in the well that broke first, precipitating the blowout. According to Apache, the Axelson system failed to relieve this pressure because although it was set to relieve pressure at 7,000 psi, the aluminum tubing inside the Axelson system had corroded, allowing the nitrogen in the nitrogen bottle to escape. Apache, as operator, had exclusive responsibility for monitoring the well and the pressure relief system. S.F. 1570. Yet, Apache never even checked the gauge on the nitrogen bottle to see whether nitrogen had escaped. Moreover, Ralph Walker, Apache's own superintendent, believed that the nitrogen bottle was not even hooked up. As a result, the blowout

occurred, billions of cubic feet of gas were lost into the atmosphere of the Texas panhandle, and lengthy and costly litigation ensued, with Apache still denying any responsibility for the blowout.[6]

The evidence at trial disclosed numerous instances of the acceptance of kickbacks and the use of drugs, prostitutes and alcohol by Apache employees. Apache claims that no causal relationship exists between those activities and the blowout and that in fact, these activities have no relevance to the Moore Group's case. Pet. 7. However, Mr. Perlin (Apache's general counsel) testified that kickbacks hurt the performance of Apache employees. S.F. 1317. Mr. Stephen Friot, a lawyer for Apache in another case involving the same type of activities, testified that such activities unquestionably undermined the quality of work of Apache's employees. S.F. 98; 104. This testimony is hardly surprising. To the contrary, the reasoning is obvious. As stated by Apache itself in an internal company memorandum:

> Companies making illegal payments would not inspect equipment as often. A foreman or supervisor [of Apache] who is on the take from this

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[6] Respondents, who are now elderly, waited until almost eleven years after the blowout to go to trial, due mostly to costly and obstructionist discovery tactics employed by Apache. *See Tom L. Scott, Inc. v. McIlhany*, 798 S.W.2d 556 (Tex. 1990), in which the Texas Supreme Court found Apache's attempts to buy the silence of expert witnesses adverse to Apache to be an "offensive and unacceptable use of discovery mechanisms", akin to "auctioning off a witness' testimony to the highest bidder", constituting a transparent violation by Apache of "the clear purpose and policy underlying the rules of discovery." 798 S.W.2d at 560.

> company would not be in a position to complain if a tool failed.

P. Ex. 50.

For the important job of inspecting the 7⅝-inch intermediate casing before it was installed in the Key 1-11 well, Apache chose White Stripe Inspection Company. S.F. 1505. Mr. Danny Merz, president of White Stripe, testified that White Stripe repeatedly furnished kickbacks, drugs and prostitutes to Apache's employees on the well prior to the blowout. S.F. 130; 152; 157-158; 182-183. Not surprisingly, White Stripe failed to inspect the intermediate casing before it went into the well. S.F. 381-382. Companies providing kickbacks, drugs, etc. could get away without performing their jobs because Apache employees accepting such gratuities were in no position to complain. S.F. 1209-1222; 1235-1236.

The Key well was "spudded"[7] in January, 1981, and was completed in July, 1981. S.F. 1475; 1528. Remarkably, Apache's regional headquarters in Tulsa, Oklahoma, was put on notice in June, 1980, that White Stripe was providing kickbacks to Apache employees. P. Ex. 65; S.F. 1587-1588. However, Apache turned right back around six months later and retained White Stripe to inspect (or in this case, fail to inspect) the 7⅝-inch intermediate casing that went into the well. S.F. 1316-1317.

Kickbacks were not the only thing that affected Apache's job performance. Mr. Wayne Eller was an Apache drilling foreman who worked on the well prior to the blowout. S.F. 42-44; 62. Mr. Eller testified that prior to

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[7] A gas well is "spudded" when the drillers first bore into the earth.

the blowout, while the well was being completed by Apache, if you wanted kickbacks you got kickbacks, if you wanted cars, you got cars, if you wanted prostitutes, you got prostitutes, if you wanted whiskey, you got whiskey, and if you wanted a new house, you got a new house. S.F. 68-69. The "benefits" that were passed around on the well prior to the blowout took the form of cocaine, double-x rated "skin flicks" and prostitutes on location. S.F. 69. Asked if his own performance was influenced by such things, Mr. Eller responded yes, that he "always worked better with a nose full of coke." S.F. 70.

Mr. Donnie Snapp was another Apache employee. S.F. 2437. He was a drilling foreman. S.F. 2448. He was hired by Apache in January, 1981 (S.F. 2448) (the same month that drilling commenced on the Key 1-11 well), and worked out of Apache's Elk City office (the office that was responsible for the Key 1-11 well) (S.F. 2449). When asked about instances of kickbacks, drugs and prostitution on the Key well prior to the blowout and their effect on the well, he repeatedly invoked his Fifth Amendment rights. S.F. 2469-2496.

Apache claims that its conduct was unknown to its management. Pet. 8, 15. However, Apache's own investigators concluded that Apache's regional office in Tulsa, Oklahoma was actively involved. P. Ex. 59. Apache claims that it "ferreted out the kickback scandal . . . , fired the involved employees, and cooperated fully with law enforcement authorities." Pet. 7. However, Apache has never offered any evidence that it ever attempted to clean house at any time prior to the blowout. To the contrary, the evidence is clear that Apache sought to clean house only after numerous lawsuits had been filed against it, in an attempt to cast itself in the best light possible in the

litigation. Apache's own in-house documents in fact reveal that as late as April 22, 1983 (over a year and a half after the blowout), Apache had neither realistic policies to deter or prevent the types of activities complained about, nor minimum safety and training standards. P. Exs. 52 & 53.

REASONS FOR DENYING THE PETITION

In light of the facts set forth above, there is a "reasonable relationship between the punitive damages award and the harm likely to result from [Apache's] conduct as well as the harm that has actually occurred." *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2721 (1993). Moreover, as is apparent from the evidence recounted above and in the Texas Court of Appeals' opinion (Pet. App. 1a *et seq.*), and as will be seen below, this case involves an isolated instance of egregious behavior, decided under Texas law that no longer exists.

1. The Texas common law rules that provided the basis for the imposition of punitive damages against Apache are no longer used in Texas.

Effective September 1, 1995, Texas enacted a new comprehensive statutory scheme for the imposition of punitive damages, covering, *inter alia*, standards for recovery, evidence, burden of proof, jury instructions[8],

[8] The Texas Court of Appeals correctly held that Apache waived its right to complain about the constitutionality of the jury instructions in this case by failing to object with specificity to such instructions, as required by Texas law. Pet. App. 25a-27a.

procedures for appellate review, and a limitation (or "cap") on the amount that can be awarded. A copy of these statutes is attached hereto as an Appendix. Accordingly, this case presents a punitive damages award imposed under a set of rules no longer used in Texas.

2. The facts of the *BMW* case are dramatically different from the facts of this case.

Apache argues that the facts of *BMW of North America, Inc. v. Gore*, No. 94-896, closely parallel the facts present here. Apache further indicates that it intends to raise arguments similar to those that have been raised in the *BMW* case. Apache suggests that the Court should therefore hold this case for disposition following its decision in *BMW*. Pet. 9-10. Without repeating all of the factual evidence discussed above, it is simply absurd to equate a case involving the concealment of minor damage to a car's paint job with a case involving a company whose drilling, completion, and monitoring practices were grossly negligent and whose management tolerated kickbacks, drugs, alcohol, and prostitution on the job, all of which led to one of the largest gas well blowouts in United States history. As a result, if the Court were to remand this case for further proceedings in light of *BMW*, the Moore Group respectfully suggests that it is likely that this case would quickly come back to this Court, simply because the evidence against Apache is overwhelmingly more egregious than the evidence against BMW.

3. The judgment in this case reflects a reasonable relationship between the punitive damages award and the harm likely to result from Apache's conduct as well as the harm that has actually occurred.

Apache argues that the ratio between punitive damages and actual damages, which it calculates to be 138:1 (Pet. 10), cannot be justified by the small award of actual damages found by the jury, particularly in light of an alleged lack of "potential harm," such as that considered by this Court in *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993), and by the Eighth Circuit in *Pulla v. Amoco Oil Co.*, 72 F.3d 648 (8th Cir. 1995). Pet. 10-11. Apache's analysis is flawed in several respects.

First, the ratio of 138:1, which Apache derives by dividing the $1,500,000 in punitive damages awarded to the Moore Group (as reduced by the Texas Court of Appeals) by the $10,835 in actual damages awarded to the Moore Group, is the result of sleight of hand. The jury awarded punitive damages and actual damages to both the Scott Group and the Moore Group. Apache then chose to pay off the Scott Group in a post-verdict settlement before judgment was entered. Members of the Scott Group, for the most part, were awarded higher actual damages by the jury than members of the Moore Group. The jury made a single punitive damages award, however, and allocated it equally to each of the eight plaintiffs. By entering into a post-verdict settlement with the members of the Scott Group, whose ratios of punitive damages were lower than members of the Moore Group, Apache bootstrapped itself into a higher ratio of punitive to actual damages in preparation for appeal. The proper ratio of punitive to actual damages is actually 23:1

($4,500,000 ÷ $191,713)[9], or at most 55:1 ($4,500,000 ÷ $81,282)[10]. Pet. App. 39a-43a. Even these ratios are too high, because they fail to take into account the subsequent reduction in punitive damages made by the Texas Court of Appeals. Apache cannot be allowed to ignore its selective settlement with some plaintiffs in order to artificially raise the punitive to actual damages ratio for the remaining plaintiffs.

More importantly, Apache's conceptual approach to the "disproportionality" issue is fundamentally incorrect. This Court has held that there should be a "reasonable relationship between the punitive damages award and the harm likely to result from [Apache's] conduct as well as the harm that has actually occurred." *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2721 (1993). It is therefore necessary to examine both the potential harm likely to result from Apache's gross negligence *and* the actual harm suffered.

With regard to potential harm, Apache admits that one of its employees, Tom Reames, was supposed to visit the well each day. Pet. 5. Had Mr. Reames been present when the well blew out, he might have been seriously injured or even killed. It would be perverse to allow Apache to take advantage of the fact that Mr. Reames was not doing his job, *i.e.*, by claiming that there was no potential harm resulting from Apache's gross negligence because Mr. Reames was not showing up each day to monitor the well. Furthermore, when it blew out, it was

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[9] $191,713 is the amount awarded by the jury to the eight plaintiffs for conversion. *See infra* at 2.

[10] $81,882 was awarded by the jury to all eight plaintiffs for gross negligence. *See infra* at 2.

shut in waiting for connection to a pipeline. If the well had blown out while being connected to the pipeline or thereafter, a major disaster would have occurred.

The "reasonable relationship" inquiry also focuses on the actual harm resulting from Apache's gross negligence. However, in discussing actual harm, Apache focuses narrowly on the actual damages awarded by the jury to the Moore Group and ignores the settlements that Apache entered into prior to judgment. Clearly, if the *potential* harm to other parties is factored into the reasonable relationship equation, so too is the *actual* harm which they suffer. *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2721 (1993); *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 21, 111 S. Ct. 1032, 1045 (1991). With this in mind, the Texas Supreme Court summarized the "big picture" surrounding this litigation:

> This case arose from the October 1981 blowout of Key Well 1-11 in Wheeler County. In terms of the gas loss, this is believed to be the largest gas well blowout in United States history. It was not brought under control for over a year. Apache Corporation operated the well and, along with El Paso Exploration Company (now known as Meridian Oil Production Company), owned the working interest. *Over one hundred parties, including mineral interest owners from adjacent properties, royalty interest owners, and claimants through such properties . . . filed suits against Apache and El Paso seeking damages alleging that Apache and El Paso's wrongful acts caused the blowout.* All of these cases have been consolidated by the trial court.

Tom L. Scott, Inc. v. McIlhany, 798 S.W.2d 556 (Tex. 1990) (dealing with discovery issues) (emphasis added).

Apache leaves out of the equation the millions of dollars of actual damages suffered by over one hundred other parties. Apache effectuated settlements with all but a few small royalty owners (the Moore Group) and now argues that the actual damages of only these royalty owners who stayed the course do not justify a large award of punitive damages. Under these circumstances, it would be perverse to allow a company whose gross negligence caused a gas well blowout of the magnitude here involved to evade an award of punitive damages on grounds that the actual damages are too small.[11]

4. The Texas Court of Appeals used a proper standard of review in connection with Apache's excessiveness claim.

Apache argues that the Texas Court of Appeals used a "highly constricted standard of review" when it rejected Apache's excessiveness claim. Pet. 9, fn. 10. However, Apache fails to mention that the Court of Appeals specifically held that the award of punitive damages was not excessive under the circumstances:

> Depicted in six sub-points, Apache contends by its fourth point of error that even if exemplary damages are justified, the trial court erred in failing to remit the excessive amount awarded. *We have previously determined the award was not excessive, pretermitting our address of this issue.*

Pet. App. 32a (emphasis added).

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[11] This is particularly true when a punitive damages award of $1,500,000 constitutes roughly 1/3 of 1% of Apache's net worth. S.F. 3948.

The fact is that even a casual reading of the decision of the Texas Court of Appeals reveals that it found that (i) the award of punitive damages to the Moore Group was not excessive under the circumstances, and (ii) Apache's point of error regarding the trial court's failure to remit was thus moot. Pet. App. 32a. The appellate court concluded:

> The evidence previously outlined is legally sufficient for the jury to have found exemplary damages. Moreover, we have determined that this evidence was sufficient to support the award and the award was not excessive or unreasonable under the circumstances.

Pet. App. 32a. In short, there is not a shred of evidence to indicate that the Texas Court of Appeals used a constricted standard of review.[12]

5. The degree of reprehensibility of the misconduct justifies the punitive damages award.

Apache suggests that the punitive damages award bears no relationship to the degree of reprehensibility of the misconduct. Pet. 12-15. Apache's argument is filled with factual inaccuracies and material omissions, and is legally flawed.

Apache first contends that "the conduct for which Apache is being mulcted must be placed on the low end of the reprehensibility spectrum" and that Apache has been fined "for no more than 'gross negligence'." Pet. 12.

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[12] In fact, the appellate court did reduce the punitive damages awarded to the Moore Group from $1,687,000 to $1,500,000.

However, under Texas law, gross negligence includes the following two elements:

> (1) viewed objectively from the standpoint of the actor, the act or omission must involve an *extreme degree of risk*, considering the probability and magnitude of the potential harm to others, and
>
> (2) the actor must have actual, subjective awareness of the risk involved, but nevertheless proceed in *conscious indifference to the rights, safety, or welfare of others.*

Transportation Ins. Co. v. Moriel, 879 S.W.2d 10, 23 (Tex. 1994) (emphasis added). As so defined, gross negligence is not "on the low end of the reprehensibility spectrum." The jury found Apache guilty of gross negligence, and the Texas Court of Appeals affirmed that finding after an extensive review of the evidence.

Furthermore, there is no doubt that the Due Process Clause allows the imposition of punitive damages upon a finding of gross negligence. As the Tenth Circuit recently stated:

> We conclude from these decisions that the Due Process Clause permits imposing damages if . . . the defendant's tortious conduct was sufficiently "egregious" to support an award of punitive damages. . . . The award of punitive damages against TIC did not offend due process. . . . It knew that danger was imminent. . . . Yet it chose to do nothing.

Patton v. TIC United Corp., 1996 U.S. LEXIS 2415, pp. 21, 23-25 (10th Cir. February 16, 1996). The language of the

Patton case echoes that of the Texas Court of Appeals in this case:

> Stated differently, Apache made a decision, in the face of impending harm, not to care about the consequences of its actions which might have, and ultimately did, lead to that harm.

Pet. App. 22a.

Apache next contends that punitive damages are inappropriate because the Key 1-11 well was drilled in accordance with industry custom. The jury decisively rejected this argument, and the Texas appellate courts agreed.[13] As shown by the evidence recounted in the Statement of the Case, *supra*, and in the Texas Court of Appeals' decision (Pet. App. 1a *et seq.*), this case presents a truly unique and egregious set of facts, which are completely at odds with industry custom. Prostitutes, cocaine and alcohol on the well site while the well was being drilled, the failure to run logs to determine whether the all important $7^5/_8$ intermediate casing had been weakened as a result of drilling cement out of it, the failure to inspect the integrity of that casing prior to its use in the well, the failure to monitor the Axelson pressure relief system to detect that its nitrogen power supply was empty and that the system was not even hooked up to its power source prior to the blowout, were not industry custom even in the most excessive years of the Texas "oil boom", which is when the Key well was drilled.[14] No responsible oil company operated in such a manner.

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[13] Even the newly constituted, tort reform-minded Texas Supreme Court declined to hear the case.

[14] As evidence that Apache followed industry custom, Apache represents to the Court that it "obtained the best

Apache then makes a bizarre argument. Noting correctly that there was conflicting expert testimony at trial, Apache urges that the very existence of such conflicting testimony precludes an award of punitive damages. Apache cites three cases in support of this proposition. Pet. 14, fn. 14. However, even a casual reading of these decisions reveals that they involve special situations not present here.

In *Satcher v. Honda Motor Co.*, 52 F.3d 1311 (5th Cir. 1995), a case dealing with whether motorcycles should be equipped with leg guards, the Fifth Circuit noted that under Mississippi law, punitive damages can be awarded only in "extreme cases." *Id.* at 1316. The court then summarized the evidence presented to the jury:

> (1) [T]here is a genuine dispute in the scientific community as to whether leg guards do more harm than good, (2) no government or agency thereof has ever required them, (3) no independent testing or professional organization has ever recommended them, (4) one of the original researchers on the problem who worked with two of the plaintiff's experts disagrees with them, (5) the industry as a whole categorically rejects the need for leg guards, and (6) Honda's

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available testing for the production *tubing* . . . and *contracted for* the standard tests for the casing. . . . " Pet. 13. However, it was the *casing* that ruptured, not the tubing. Further, while Apache may have "contracted for" the standard tests for the casing, those tests were not performed. S.F. 381-382. This is not surprising, since the company that Apache contracted with to test the casing had a known history of providing Apache employees with kickbacks (P. Ex. 65; S.F. 1587-1588) and in fact provided kickbacks, drugs and prostitutes to the Key well prior to the blowout. S.F. 130; 152; 157-158; 182-183.

> own testing on their use reached no definitive conclusions.

Id. at 1317. On this record, the Fifth Circuit held that no reasonable jury could find that this was an "extreme case" that merited punitive damages. The difference between the evidence in *Satcher* and the evidence in the present case is obvious. The Key 1-11 well was not drilled, completed, or monitored in accordance with industry standards, or even common sense.

In *AMPAT/Midwest, Inc. v. Illinois Tool Works, Inc.*, 896 F.2d 1035 (7th Cir. 1989), the Seventh Circuit held that the trial court had not abused its discretion by setting aside a jury award of punitive damages. The court noted that Illinois law only allows punitive damages in very limited situations, *e.g.*, gross fraud, breach of trust, or other extraordinary or exceptional circumstances clearly showing malice and willfulness. *Id.* at 1043. The *AMPAT* case involved defective Tapcons, which are carbon steel screws used to anchor window frames to walls. The evidence showed that the safety hazard from the defective Tapcons was small; in particular, no window frames ever fell out of the building in question. The court concluded:

> This was a close case on liability . . . , and it makes sense to scale down an award of damages in recognition of a distinct possibility that the judgment may be premised on a mistaken finding of liability.

Id. at 1044. Apache no doubt wishes that this case were a "close case on liability", but no unbiased person who examines the evidence would ever come away believing that the judgment in this case "may be premised on a mistaken finding of liability."

Finally, *Loitz v. Remington Arms Co.*, 563 N.E.2d 397 (Ill. 1990), involved the safety and suitability of the metal used in Remington's Model 1100 shotgun barrel. After noting that Illinois allows punitive damages only in cases of willful and wanton misconduct, or perhaps flagrant indifference to public safety, the Illinois Supreme Court reversed an award of punitive damages that had been based upon failure to warn, because "[t]he plaintiff did not present any evidence that would cast doubt on Remington's good faith. . . . " *Id.* at 407. The facts of *Loitz* are light-years away from the present case, where once again, as the Texas Court of Appeals stated, "Apache made a decision, in the face of impending harm, not to care about the consequences of its actions which might have, and ultimately did, lead to that harm." Pet. App. 22a.

It has never been the law that the existence of conflicting expert testimony prohibits *per se* the imposition of punitive damages. None of the three cases cited by Apache supports that proposition.

Apache concludes the portion of its argument on the relationship of the punitive damages award to the reprehensibility of the misconduct with several misstatements, such as this case "involved an isolated instance of inattentiveness and/or bad judgment by low-level employees" and "there can be no question that management neither participated in that scheme nor approved it once it learned of it." Pet. 15. As discussed above, these statements are simply untrue.

6. The punitive damages award in this case is needed for proper deterrence.

Apache's final argument is that because Apache was the principal victim of its own gross negligence, because Apache "and Meridian"[15] lost millions of dollars worth of gas, and because Apache suffered "mammoth losses" as a result of the blowout, it should be exempt from punitive damages. Pet. 16. Not surprisingly, Apache cites no supporting authority for its argument. The severity of financial loss suffered as the result of one's own gross negligence has never been a defense to punitive damages, nor should it be. Moreover, Apache fails to mention that its pretrial settlements with parties it sued other than Axelson, and Apache's settlement of its multi-million dollar claim against Axelson after the *voir dire* examination of the jury panel, significantly reduced its claimed losses. At any rate, as noted earlier, the evidence showed that even a year and a half after the blowout, Apache had neither realistic policies to prevent the types of activities complained about, nor minimum safety and training standards. Apache conducted an internal investigation and began to operate more responsibly only after it had been repeatedly sued, in an effort to cast itself in the best possible light for purposes of litigation.

* * *

In light of these considerations, this Court should deny Apache's Petition regardless of how the *BMW* case is decided. If the Court finds the punitive damages in *BMW* to be excessive, and remands this case for further

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[15] Apache's reference to Meridian is puzzling, since Meridian is not a party to this proceeding.

consideration in light of *BMW*, the uniquely egregious facts of this case may well insure its swift return to this Court. If, on the other hand, the Court does not reach the excessiveness issue in *BMW*, this case is simply not an appropriate vehicle to address the boundaries of the Due Process Clause, not only because of its unique facts, but also because the punitive damages award occurred under a set of common law rules no longer used in Texas.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JACK O'NEILL*
KELLY J. KIRKLAND
CLEMENTS, O'NEILL, PIERCE
& NICKENS, L.L.P.
1000 Louisiana, Suite 1800
Houston, Texas 77002-5009
(713) 654-7600

*Counsel of Record

Counsel for Respondents

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APPENDIX

CHAPTER 41. EXEMPLARY DAMAGES

§ 41.001. Definitions

In this chapter:

(1) "Claimant" means a party, including a plaintiff, counterclaimant, cross-claimant, or third-party plaintiff, seeking recovery of exemplary damages. In a cause of action in which a party seeks recovery of exemplary damages related to injury of another person, damage to the property of another person, death of another person, or other harm to another person, "claimant" includes both that other person and the party seeking recovery of exemplary damages.

(2) "Clear and convincing" means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.

(3) "Defendant" means a party, including a counterdefendant, cross-defendant, or third-party defendant, from whom a claimant seeks relief with respect to exemplary damages.

(4) "Economic damages" means compensatory damages for pecuniary loss; the term does not include exemplary damages or damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society.

(5) "Exemplary damages" means any damages awarded as a penalty or by way of punishment. "Exemplary damages" includes punitive damages.

(6) "Fraud" means fraud other than constructive fraud.

(7) "Malice" means:

(A) a specific intent by the defendant to cause substantial injury to the claimant; or

(B) an act or omission:

(i) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and

(ii) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

§ 41.002. Applicability

(a) This chapter applies to any action in which a claimant seeks exemplary damages relating to a cause of action.

(b) This chapter establishes the maximum exemplary damages that may be awarded in an action subject to this chapter, including an action for which exemplary damages are awarded under another law of this state. This chapter does not apply to the extent another law establishes a lower maximum amount of exemplary damages for a particular claim.

(b) This chapter does not apply to:

(1) an action brought under the Deceptive Trade Practices-Consumer Protection Act (Subchapter E, Chapter 17, Business & Commerce Code) except as specifically provided in Section 17.50 of that Act;

(2) an action brought under Chapter 21, Insurance Code;

(3) an action brought under the workers' compensation laws of this state (Title 5, Labor Code);

(4) an action to recover exemplary damages against an employer by the employee's beneficiaries in a death action arising out of the course and scope of employment where the employer is a subscriber under the workers' compensation laws of this state (Title 5, Labor Code);

(5) an action brought under Chapter 246, Acts of the 63rd Legislature, Regular Session, 1973, Home Solicitation Transactions (Article 5069-13.01 et seq., Vernon's Texas Civil Statutes);

(6) an action brought under Chapter 547, Acts of the 63rd Legislature, Regular Session, 1973, Debt Collection Practices (Article 5069-11.01 et seq., Vernon's Texas Civil Statutes);

(7) an action brought under Chapter 54, 91, or 92, Property Code;

(8) an action brought under the Texas Manufactured Housing Standards Act (Article 5221f, Vernon's Texas Civil Statutes);

(9) an action brought under the Texas Motor Vehicle Commission Code (Article 4413(36), Vernon's Texas Civil Statutes);

(10) an action brought under Chapter 132, Education Code;

(11) an action brought under Section 9.507 or Section 27.01, Business & Commerce Code;

(12) an action brought under Chapter 36, Family Code;

(13) an action brought under the Health Spa Act (Article 5221l, Vernon's Texas Civil Statutes);

(14) an action brought under the Business Opportunity Act (Article 5069-16.01 et seq., Vernon's Texas Civil Statutes); or

(15) an action brought under Chapter 221, Property Code.

(c) Except as provided by Subsections (b) and (d), in an action to which this chapter applies, the provisions of this chapter prevail over all other law to the extent of any conflict.

(d) Notwithstanding any provision to the contrary, this chapter does not apply to Section 15.21, Business & Commerce Code (Texas Free Enterprise and Antitrust Act of 1983), an action brought under the Deceptive Trade Practices-Consumer Protection Act (Subchapter E, Chapter 17, Business & Commerce Code) except as specifically provided in Section 17.50 of that Act, or an action brought under Chapter 21, Insurance Code.

§ 41.003. Standards for Recovery of Exemplary Damages

(a) Except as provided by Subsection (c), exemplary damages may be awarded only if the claimant proves by clear and convincing evidence that the harm with respect

to which the claimant seeks recovery of exemplary damages results from:

(1) fraud;

(2) malice; or

(3) wilful act or omission or gross neglect in wrongful death actions brought by or on behalf of a surviving spouse or heirs of the decedent's body, under a statute enacted pursuant to Section 26, Article XVI, Texas Constitution. In such cases, the definition of "gross neglect" in the instruction submitted to the jury shall be the definition stated in Section 41.001(7)(B).

(b) The claimant must prove by clear and convincing evidence the elements of exemplary damages as provided by this section. This burden of proof may not be shifted to the defendant or satisfied by evidence of ordinary negligence, bad faith, or a deceptive trade practice.

(c) If the claimant relies on a statute establishing a cause of action and authorizing exemplary damages in specified circumstances or in conjunction with a specified culpable mental state, exemplary damages may be awarded only if the claimant proves by clear and convincing evidence that the damages result from the specified circumstances or culpable mental state.

§ 41.004. Factors Precluding Recovery

(a) Except as provided by Subsection (b), exemplary damages may be awarded only if damages other than nominal damages are awarded.

(b) A claimant may recover exemplary damages, even if only nominal damages are awarded, if the claimant establishes by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from malice as defined in Section 41.001(7)(A). Exemplary damages may not be awarded to a claimant who elects to have his recovery multiplied under another statute.

§ 41.005. Harm Resulting From Criminal act

(a) In an action arising from harm resulting from an assault, theft, or other criminal act, a court may not award exemplary damages against a defendant because of the criminal act of another.

(b) The exemption provided by Subsection (a) does not apply if:

(1) the criminal act was committed by an employee of the defendant;

(2) the defendant is criminally responsible as a party to the criminal act under the provisions of Chapter 7, Penal Code;

(3) the criminal act occurred at a location where, at the time of the criminal act, the defendant was maintaining a common nuisance under the provisions of Chapter 125, Civil Practice and Remedies Code, and had not made reasonable attempts to abate the nuisance; or

(4) the criminal act resulted from the defendant's intentional or knowing violation of a statutory duty under Subchapter D, Chapter 92, Property Code, and the criminal act occurred after the statutory deadline for compliance with that duty.

(c) In an action arising out of a criminal act committed by an employee, the employer may be liable for punitive damages but only if:

(1) the principal authorized the doing and the manner of the act;

(2) the agent was unfit and the principal acted with malice in employing or retaining him;

(3) the agent was employed in a managerial capacity and was acting in the scope of employment; or

(4) the employer or a manager of the employer ratified or approved the act.

§ 41.006. Award Specific to Defendant

In any action in which there are two or more defendants an award of exemplary damages must be specific as to a defendant, and each defendant is liable only for the amount of the award made against that defendant.

§ 41.007. Prejudgment Interest

Prejudgment interest may not be assessed or recovered on an award of exemplary damages.

§ 41.008. Limitation on Amount of Recovery

(a) In an action in which a claimant seeks recovery of exemplary damages, the trier of fact shall determine the amount of economic damages separately from the amount of other compensatory damages.

(b) Exemplary damages awarded against a defendant may not exceed an amount equal to the greater of:

(1)(A) two times the amount of economic damages; plus

(B) an amount equal to any noneconomic damages found by the jury, not to exceed $750,000; or

(2) $200,000.

(c) Subsection (b) does not apply to a cause of action against a defendant from whom a plaintiff seeks recovery of exemplary damages based on conduct described as a felony in the following sections of the Penal Code if, except for Sections 49.07 and 49.08, the conduct was committed knowingly or intentionally:

(1) Section 19.02 (murder);

(2) Section 19.03 (capital murder);

(3) Section 20.04 (aggravated kidnapping);

(4) Section 22.02 (aggravated assault);

(5) Section 22.011 (sexual assault);

(6) Section 22.021 (aggravated sexual assault);

(7) Section 22.04 (injury to a child, elderly individual, or disabled individual);

(8) Section 32.21 (forgery);

(9) Section 32.43 (commercial bribery);

(10) Section 32.45 (misapplication of fiduciary property or property of financial institution);

(11) Section 32.46 (securing execution of document of deception);

(12) Section 32.47 (fraudulent destruction, removal, or concealment of writing);

(13) Chapter 31 (theft) the punishment level for which is a felony of the third degree or higher;

(14) Section 49.07 (intoxication assault); or

(15) Section 49.08 (intoxication manslaughter).

§ 41.009. Bifurcated Trial

(a) On motion by a defendant, the court shall provide for a bifurcated trial under this section. A motion under this subsection shall be made prior to voir dire examination of the jury or at a time specified by a pretrial court order issued under Rule 166, Texas Rules of Civil Procedure.

(b) In an action with more than one defendant, the court shall provide for a bifurcated trial on motion of any defendant.

(c) In the first phase of a bifurcated trial, the trier of fact shall determine:

(1) liability for compensatory and exemplary damages; and

(2) the amount of compensatory damages.

(d) If liability for exemplary damages is established during the first phase of a bifurcated trial, the trier of fact shall, in the second phase of the trial, determine the amount of exemplary damages to be awarded, if any.

§ 41.010. Considerations in Making Award

(a) Before making an award of exemplary damages, the trier of fact shall consider the definition and purposes of exemplary damages as provided by Section 41.001.

(b) The determination of whether to award exemplary damages and the amount of exemplary damages to be awarded is within the discretion of the trier of fact.

§ 41.011. Evidence Relating to Amount of Exemplary Damages

(a) In determining the amount of exemplary damages, the trier of fact shall consider evidence if any, relating to:

(1) the nature of the wrong;

(2) the character of the conduct involved;

(3) the degree of culpability of the wrongdoer;

(4) the situation and sensibilities of the parties concerned;

(5) the extent to which such conduct offends a public sense of justice and propriety; and

(6) the net worth of the defendant.

(b) Evidence that is relevant only to the amount of exemplary damages that may be awarded is not admissible during the first phase of a bifurcated trial.

§ 41.012. Jury Instructions

In a trial to a jury, the court shall instruct the jury with regard to Sections 41.001, 41.003, 41.010, and 41.011.

§ 41.013. Judicial Review of Award

(a) Except as provided for in Subsection (b), an appellate court that reviews the evidence with respect to a finding by a trier of fact concerning liability for exemplary damages or with respect to the amount of exemplary damages awarded shall state, in a written opinion, the court's reasons for upholding or disturbing the finding or award. The written opinion shall address the evidence or lack of evidence with specificity, as it relates to the liability for or amount of exemplary damages, in light of the requirements of this chapter.

(b) This section does not apply to the supreme court with respect to its consideration of an application for writ of error.

(3)

Supreme Court, U.S.
FILED
APR 16 1996

No. 95-1414

In the Supreme Court of the United States

OCTOBER TERM, 1995

APACHE CORPORATION, *Petitioner*

v.

LEO MOORE, DAISY MOORE, AND BESS COLE,
Respondents

On Petition for a Writ of Certiorari to the Court of Appeals of Texas

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REPLY BRIEF FOR THE PETITIONER

JESS H. HALL, JR.
JAMES E. ESSIG
JEFF WEEMS
Liddell, Sapp, Zivley, Hill & LaBoon, L.L.P.
3300 Texas Commerce Tower
Houston, TX 77002
(713) 226-1200

ANDREW L. FREY*
EVAN M. TAGER
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0602

Counsel for Petitioner
* *Counsel of Record*

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REPLY BRIEF FOR THE PETITIONER

Respondents implicitly concede that this case involves no deliberate misconduct (Opp. 23-24); they admit that the conduct was an "isolated" occurrence (Opp. 17); and they, by and large, do not contest that the allegedly negligent conduct in this case was that of low-level employees rather than top or even mid-level Apache management.[1] Indeed, their own statement of facts confirms that, far from being an egregious wrongdoer, Apache, if anything, was the victim of the negligence of its low-level employees. See Opp. 10-13 (discussing failure of low-level employees to monitor the relief valve and to ensure that the valve was connected to its power source). In view of these explicit and implicit concessions, it is simply preposterous for respondents to suggest (Opp. 18) that "the evidence against Apache is overwhelmingly more egregious than the evidence against BMW" and that there therefore is no point to holding this case during the pendency of the *BMW* case.

REPLY STATEMENT OF FACTS

Even accepting every word of respondents' statement of facts as true, that presentation does nothing to undermine our central point that Apache's conduct in this case was nowhere near so heinous as to justify the punishment meted out by the jury. Nevertheless, a few points of clarification are in order.

1. *Clower's alcoholism.* Respondents emphasize (Opp. 7) that a drilling foreman for the Key 1-11 well, Gordon Clower, was an alcoholic. Although a few employees in the Elk City field office may have known of Clower's insobriety, however, there is no evidence that anyone in management had such knowledge. Moreover, when, as a consequence of the "kick," Clower's supervisor learned that Clower had failed in his duties

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[1] The only allegedly negligent act that respondents attribute to anyone other than a low-level employee is the decision by Loyd Somers, an engineering supervisor in Apache's Tulsa office, to install a relief valve rather than immediately pull and rework the tubing after the employees in the field discovered the pressure on the backside. See Opp. 8-9. As we discuss below (at pages 2-3), Somers' judgment call was manifestly reasonable and certainly not the kind of conduct warranting a seven-digit punishment.

by being absent from the well site, Clower was fired immediately. Tr. 2727. That prompt and decisive action is hardly indicative of indifference to the proper management of the well.

2. *The "kick" and its aftermath.* Respondents insinuate (Opp. 7) that fault for the "kick" should be laid at Apache's door. It is undisputed, however, that the kick was the result of a cardinal error (the failure to pump sufficient amounts of drilling mud into the hole) committed by *Ratliff*, which had been hired specifically for its expertise in the drilling of wells. Tr. 2206, 2725-2728.

The categorical assertion (Opp. 8) that, in drilling out the cement, Apache's contractor "cut into the casing and weakened its walls" is misleading.[2] There was no proof whatever — only the speculation of respondents' paid experts — that the contractor cut into the casing, much less that the casing was weakened as a result. Even assuming that there were something more than speculation to support respondents' hypothesis, there is no evidence to support the further inference that the drilling of the cement had a causal connection to the blowout. Indeed, the evidence strongly suggests the absence of such a connection. It is undisputed that the cement backed up no higher than 7,700 feet from the surface. Tr. 1490. Respondents' expert opined that the casing ruptured 1,000 to 2,500 feet below the surface (Tr. 1586, 1678-1679) — nowhere near the area in which the drilling of the cement took place.

3. *Somers' decision not to pull the tubing immediately after discovery of the pressure on the backside.* Respondents provide an incomplete and misleading description of Loyd Somers' decision not to pull the tubing and rework the well after Apache's field employees discovered the pressure on the backside. See Opp. 8-9. Somers did not simply ignore the need to address the leak in favor of the less expensive alternative of installing a relief valve. Rather, it was his conclusion — based

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[2] Although respondents gloss over the fact, here again Apache acted responsibly by hiring an outside contractor that specialized in just this problem to drill out the cement from the casing. Tr. 708-709, 2728.

on his experience with other wells — that there would be "less problems" if Apache could first "put [the well] on the pipeline and flow it and get the pressure down on the well before we went into the well and tried to make repairs." Tr. 2302. Because Somers expected that connection with the pipeline would be imminent (Tr. 2305), he elected to employ a relief valve to stabilize the pressure. Nevertheless, it is undisputed that Somers would have ordered that the tubing be pulled and further corrective action be taken if the pressure did not subside. Tr. 1583, 2873. In fact, however, the pressure stabilized at around 6,000 pounds per square inch. Tr. 2310-2312.

Somers' measured response to the discovery of the pressure on the backside hardly constitutes the kind of conscious indifference that would justify levying a multimillion dollar punishment against his employer. To the contrary, as we pointed out in the petition (at 13-14), Apache's expert testified that Somers' decision not to pull the tubing immediately "was a decision that *every* operator that I've worked with in the Anadarko Basin would have made under the same or similar circumstances." Tr. 2735 (emphasis added).

4. *The kickback scandal.* In an effort to bolster the implication that the kickback scandal had a direct and substantial causal relationship to the blowout, respondents quote an internal memorandum that states that "[c]ompanies making illegal payments would not inspect equipment as often" and that an Apache foreman or supervisor who had received kickbacks "would not be in a position to complain if a tool failed." Opp. 14-15 (quoting P. Exh. 50). Respondents neglect to inform the Court that those statements were "generalizations about * * * the situation as a whole" and in no way purported to constitute "specific conclusions about particular items," let alone findings regarding the effect of kickbacks on the drilling of the Key 1-11 well. See P. Exh. 50.

Respondents' assertion (Opp. 15) that White Stripe failed to inspect the intermediate casing is simply wrong. White Stripe's president (Danny Merz), the White Stripe employee responsible for the Key 1-11 job (Lupe Jalomo), and Apache's drilling

supervisor (Ralph Walker) all testified that White Stripe did a full API inspection on the 7⅝ inch intermediate casing. Tr. 128-129, 2214, 3269-3270, 3280-3281. Merz, Jalomo, and White Stripe salesman Darrel McDonel further testified that White Stripe wanted to perform a similar inspection on the production tubing but that Walker authorized and White Stripe performed only the less expensive clean, visual and drift inspection. Tr. 129, 381, 3272-3273.[3] McDonel did testify that Merz said that "'we hadn't inspected the pipe; we're going to get blamed for [the blowout]; it's going to haunt us,' and then went immediately to the clean visual and drift end of it." Tr. 382 (internal quotation marks added). It is obvious from the reference to "the clean visual and drift end of it" that McDonel understood Merz to be saying that he expected White Stripe to be blamed because it had not performed the full API inspection on the tubing, not that White Stripe had performed no inspection at all.

Respondents intimate take Apache dragged its feet in response to the kickback scandal, asserting (Opp. 16-17) that Apache did not begin investigating the scandal until after it had been sued and that Apache was still considering appropriate safeguards "over a year and a half after the blowout." There is no evidence, however, that Apache management knew of kickbacks but decided to delay investigation. Nor is there evidence that Apache decided to conduct an internal investigation because it believed that such an investigation would benefit it in the litigation arising out of the blowout. To the contrary, the record unequivocally reflects that Apache made a conscious decision to pursue the investigation despite its belief that, by exposing the

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[3] The API inspection involves running each length of pipe through a machine that electronically inspects the pipe for cracks and other defects. Tr. 127-128; 3271. This kind of inspection was not common at that time, but has become so subsequently. Tr. 3276. A clean, visual and drift inspection involves cleaning the threads with a solvent, visually inspecting the threads to ensure that they have not been damaged during transit, and placing a cylinder through the inside of the pipe to ensure that the internal diameter is uniform so that the drilling crew will not drill into the casing at any point. Tr. 126-127, 3267-3269.

misdeeds of its employees and contractors, it would be creating a cadre of witnesses with a motivation to skew their testimony against it. P. Exh. 54, at KB200013815; Tr. 1254. Finally, the suggestion that Apache delayed unreasonably in implementing additional safeguards against future kickback scandals is supported by neither the record nor common sense. The exhibits cited by respondents reflect that Apache's in-house attorneys believed that the development of specific safeguards could not occur until they had completed their internal investigation and gotten a full understanding of the "recurring problems and exposures identified in these investigations." See P. Exh. 52, at KB200013819. There is nothing nefarious about that reasoning.[4]

ARGUMENT

To our knowledge, this Court has held every recent petition presenting a preserved claim of excessive punitive damages pending its consideration and disposition of *BMW*. Nothing said in the brief in opposition warrants a different outcome here.

1. Respondents contend (Opp. 17-18) that Texas's enactment of tort reform legislation makes this case unworthy of review. That argument is doubly misguided. First, because the statute applies only to causes of action accruing after September 1, 1995, there remain literally thousands of claims in the Texas courts that are not governed by the statute. Second, and more fundamentally, the question of excessive punitive damages will continue to arise whether or not a particular state attempts to put limits on such damages. Because the factors relevant to reviewing the amount of punitive damages under the Due Process

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[4] As a review of the exhibits will reveal, Apache conducted a model investigation. The in-house attorneys were thorough and diligent, yet at all times took pains to ensure that the innocent were not tarred by the misdeeds of their co-workers. P. Exhs. 52-54, 56-60. Although they believed that the adoption of specific safeguards should await the completion of the investigation, they nonetheless made several broad suggestions to serve as the framework for more detailed proposals. See P. Exh. 52, at KB200013819.

Clause will not vary from state to state, there is no reason to refuse to review a Texas case merely because, if all goes as planned, there should be fewer excessive punitive exactions in Texas in the future.

2. Respondents offer a smorgasbord of unpersuasive reasons why the Court should ignore the startling 138:1 ratio of punitive to compensatory damages. See Opp. 19-22. They first contend that the true ratio is much smaller because we have failed to factor in the damages awarded to the five other plaintiffs. Because those plaintiffs settled their claims for an amount that is not in the record, there is no basis for including in the analysis of respondents' judgment the compensatory and punitive damages awarded to the settling plaintiffs (but neither received by them nor even approved by any reviewing court). Even if the awards to the other five plaintiffs are included in the analysis, however, the ratio would be over 55:1.[5] In the absence of evidence that additional harm not encompassed within the damages award was *likely*, ratios of that magnitude give rise to serious constitutional concern. See *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 23 (1991) (declaring a 4:1 ratio to be "close to the line").

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[5] Respondents are simply wrong in suggesting (Opp. 19-20) that it would be appropriate to compare the punitive damages to the conversion damages found by the jury. After briefing regarding the appropriateness of any conversion award under the facts of this case, the trial court declined to enter judgment on the conversion award. See Pet. App. 43a (entering judgment only on the gross negligence awards and the punitive damages award). In essence, the court granted Apache's motion for judgment notwithstanding the verdict with respect to the conversion claim. Because respondents had no cognizable claim for conversion damages, it is inappropriate to consider the jury's conversion awards for purposes of evaluating whether the punitive damages are disproportionate.

In any event, the jury expressly found that the conversion was not willful or knowing. Pet. App. 40a. Because the conversion did not involve conduct that could give rise to punitive damages, it is not logical to use the conversion damages as a measure of the appropriate amount of punitive damages.

Respondents' assertion (Opp. 20) that this case does involve *likely* potential, but unrealized, harm — namely, the possibility of physical injury to Apache employee Tom Reames — is unsupported by any citation to the record. There was no evidence whatever that Reames would *likely* have been injured had he monitored the well on a daily basis as he should have done. Nor may such a fact be assumed. Whatever gaps there may have been in Reames' training regarding Axelson relief valves, there is no basis for assuming that he would not have noticed the warning signs of an imminent blowout and quickly removed himself from harm's way. To the contrary, it is undisputed that when Reames did go to the well, he did read the casing pressure gauge, which regularly reflected a pressure of around 6,200 pounds per square inch. Tr. 3220-3222. Had he gone to the well and read the gauge in the days preceding the blowout, he surely would have observed an increase in pressure that would have caused him to take precautions to protect himself. Moreover, the record reflects that, when the well blew out, the wellhead shot straight up into the air. Tr. 2373. Reames would have had to be practically sitting on the wellhead in order to have been injured.

Respondents also urge the Court to factor into the analysis the damage caused to other mineral interest and royalty owners who settled with Apache prior to trial. Opp. 21-22. As with the five plaintiffs who settled after the trial, the amounts of the settlements are not in the record and it is, for that reason alone, improper to rely upon the damage caused to those individuals. For all anyone knows, if the jury had been told how much Apache had paid in settlement, it might have concluded that the deterrent function had already been adequately served and that little or no punitive damages needed to be added.

In sum, respondents have not so thoroughly refuted our showing of disproportionality (or indeed come anywhere close to doing so) as to make it pointless even to hold the petition until *BMW* is decided. To the contrary, their arguments underscore the need for further guidance on this important factor in the excessiveness analysis.

3. Respondents' discussion of the reprehensibility factor also fails to justify their request that the petition be denied without awaiting the resolution of *BMW*. To begin with, respondents concede that the conduct here involved gross negligence but contend that, as defined by the Texas Supreme Court, gross negligence is not on the low end of the reprehensibility spectrum. Opp. 23-24. In assessing the nature of the conduct here, however, Texas's definition of gross negligence is irrelevant. What matters is whether, taking the evidence in the light most favorable to the verdict, the conduct is closer to ordinary negligence, hence warranting a comparatively modest penalty, or instead is closer to a deliberate and malicious wrongdoing, which would warrant a more severe punishment. Here, although concluding that the jury's finding of gross negligence was sustainable, the Court of Appeals identified *no* evidence (and respondents cite none in their opposition) that, in the course of drilling the Key 1-11 well, Apache consciously decided to ignore an extreme degree of risk. Nor, given the fact that Apache expected this well to be its best producer *ever* (Tr. 1409, 1587, 2876), would it be reasonable to infer that Apache made a conscious — and patently irrational — decision to disregard a high risk that there would be an immensely harmful (to Apache) blowout. Because there is no evidence and no basis for inferring that Apache deliberately ignored an extreme risk, the conclusion is inescapable that the conduct here was among the least reprehensible for which punishment can be levied (no matter what the Texas courts concluded on the liability point).

Respondents assert (Opp. 25) that the drilling of the Key 1-11 well was "completely at odds with industry custom." It is true, to be sure, that certain conduct identified by respondents — particularly the kickbacks and the alleged failure to monitor the relief valve properly (neither of which were authorized or endorsed by Apache management) — did not comport with industry standards. But because we are not here challenging the imposition of punitive liability, but rather only the amount, the question of compliance with industry custom is not an all-or-nothing proposition. As respondents steadfastly ignore, it is undisputed that, in many important ways, Apache's conduct in

overseeing the drilling of the well comported with or exceeded industry custom. See Pet. 13-14. That fact is highly relevant in determining whether a punishment of the magnitude involved here exceeded the bounds of reasonableness.

Respondents similarly misunderstand our point regarding the good-faith dispute among experts. Contrary to respondents' assumption (Opp. 28), we do not here contend that such a dispute should cut off punitive damages entirely (although there is much merit to that contention). Rather, our point simply is that the existence of a genuine dispute as to whether a defendant's conduct was even negligent weighs against finding that the conduct was so reprehensible as to warrant a multimillion dollar punishment. As to that argument, respondents have nothing to say.

4. We argued in the petition (at 16) that the fact that Apache itself lost tens of millions of dollars as a result of the blowout weighs heavily against the conclusion that a multimillion dollar punishment is reasonably necessary to deter Apache and other operators from cutting corners in the drilling of wells.[6] Respondents argue (Opp. 29) that we have overstated the loss to Apache because it recovered substantial amounts in settlements from other defendants. But that argument only highlights the fact that Apache, like respondents, was a victim here not just of the negligence of its low-level employees but also of that of some of its vendors. Large punitive exactions hardly are necessary to "deter" businesses from being victimized by the negligence of their employees and vendors.

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[6] In stating that "[t]he severity of financial loss suffered as the result of one's own gross negligence has never been a defense to punitive damages" (Opp. 29), respondents once again misperceive our point. Our contention is not that liability for punitive damages is constitutionally impermissible, but rather that the amount imposed here is excessive.

CONCLUSION

Nothing respondents have said in their opposition warrants the extraordinary step of denying the petition without awaiting the outcome of *BMW*. Indeed, the opposition serves only to confirm that, if the Court does not reach the excessiveness issue in *BMW*, this case — involving as it does a high ratio of punitive to actual damages and an isolated instance of non-intentional wrongdoing of which the principal victim was the defendant itself — would be a particularly good one in which to address that recurring and important question. The petition for certiorari should be granted.

Respectfully submitted.

JESS H. HALL, JR.
JAMES E. ESSIG
JEFF WEEMS
Liddell, Sapp, Zivley, Hill & LaBoon, L.L.P.
3300 Texas Commerce Tower
Houston, TX 77002
(713) 226-1200

ANDREW L. FREY*
EVAN M. TAGER
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0602

Counsel for Petitioner
* *Counsel of Record*

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